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ABSTRACT

This chapter reviews 1982 cases involving pupils. Such cases increased one-third in 1982, with much of the increase attributable to litigation concerning the rights of handicapped students. A 1982 U.S. Supreme Court case defining the congressional mandate of an "appropriate education" for such students may help reduce the controversy in this area. Issues of student rights, including school library book removal and drug searches, received conflicting decisions, while "moments of silence" as an alternative to school prayer and laws requiring the teaching of "creation science" were rebuffed in federal courts. Desegregation litigation continued with little resolution. Sections of this chapter are devoted to cases involving handicapped and exceptional children; public school assignment, tuition, and transportation; bilingual-bicultural programs; private and parochial schools; school sports; substantive rights of students; sanctions for student misconduct; testing and placement; and desegregation. (MJL)

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PUPILS

Henry S. Lufler, Jr.*

Introduction 4.0
Handicapped and Exceptional Children 4.1
- Tuition and Assignment 4.1a
- Right to Education and Services 4.1b
- Discipline 4.1c
- Attorney Fees and Damages 4.1d

Public School Assignment, Tuition and Transportation 4.2
- Tuition and Assignment 4.2a
- Transportation 4.2b
- Compulsory Attendance 4.2c

Bilingual-Bicultural Programs 4.3
Private and Parochial Schools 4.4
School Sports 4.5
- State Athletic and Activity Associations 4.5a
- Sex Discrimination 4.5b

Substantive Rights of Students 4.6
- Search and Seizure 4.6a
- First Amendment Religious Rights 4.6b
- First Amendment Freedom of Expression 4.6c

Sanctions for Student Misconduct 4.7
- Suspensions and Expulsions 4.7a
- Corporal Punishment 4.7b

Testing and Placement 4.8
Desegregation 4.9
- Systemwide Remedies 4.9a
- Cross-District Remedies 4.9b
- Developments Under *Swann* and *Keyes* 4.9c
- Other Federal Cases 4.9d
- Fifth Circuit Cases 4.9e
- State Courts 4.9f

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4.0 INTRODUCTION

Courts continue to make decisions about almost every aspect of pupil treatment. Cases involving pupils increased by one-third last year with much of the increase attributable to litigation concerning the rights of handicapped students. A 1982 United States Supreme Court case defining the Congressional mandate of an "appropriate education" to be provided such students and also limiting the role of lower courts to review placement decisions may help reduce the controversy in this area. Two dozen cases in which attorneys sought fees and damages for representing handicapped children were recorded, with mixed results, suggesting that fees will be the subject of further litigation next year.

A muddled United States Supreme Court decision on school library book removal did little to resolve the confusing issues in this first amendment area. The use of sniff dogs in school drug searches was also subject of conflicting decisions. "Moments of silence" as an alternative to school prayer and laws requiring the teaching of "creation science" found little support in federal courts, illustrating that courts can definitively address at least some issues. Costly desegregation litigation continued, with little resolution of outstanding issues.

4.1 HANDICAPPED AND EXCEPTIONAL CHILDREN

In 1982 the Supreme Court heard its first case involving the requirements of the Education for All Handicapped Children Act of 1975 (EHCA).[1] At issue was a federal court decision, upheld by the Second Circuit Court of Appeals in a divided vote, requiring that a deaf child be provided with a sign language interpreter in her elementary school classroom.[2] The Supreme Court, concluding that this costly service was beyond the scope of the Act's requirements, addressed two of the questions which have dominated the mushrooming litigation in this area: What is meant by EHCA's requirement that handicapped students receive a "free appropriate public education," and what is the role of the courts in reviewing a handicapped student's placement or program under the terms of EHCA?

The case began when the parents of Amy Rowley, then in the first grade, challenged the "individualized educational plan" (IEP) prepared for her by the Furnace Woods School in the Hendrick Hudson

1. Board of Educ. of Hendrick Hudson Cent. School Dist. v. Rowley, 102 S. Ct. 3034 (1982).
2. Rowley v. Board of Educ. of Hendrick Hudson Cent. School Dist., 483 F. Supp. 528 (S.D.N.Y. 1980); *aff'd*, 632 F.2d 945 (2d Cir. 1980).

Central School District, Peekskill, New York. The IEP provided that Amy should be educated in a regular classroom, using an FM hearing aid and receiving instruction from a tutor for the deaf for one hour each day and from a speech therapist for three hours each week. In addition, school staff had attended a course in sign language interpretation and a teletype machine had been installed in the principal's office to permit the school to communicate with Amy's parents who are also deaf. Amy's parents, however, asked that she be provided with a sign language interpreter for her academic classes. The school system declined to do so and the suit resulted.

The district court found that Amy "performs better than the average child in her class and is advancing easily from grade to grade."[3] The court concluded, however, that she was not performing as well as she would have without her handicap and that EHCA required that she be provided "an opportunity to achieve [her] full potential commensurate with the opportunity provided to other children."[4] The court also concluded that the responsibility for determining what constituted an "appropriate education" under EHCA had been left "entirely to the federal courts and the hearing officers."[5] The Court of Appeals for the Second Circuit affirmed and the Supreme Court was left to decide the role of the courts and whether "appropriate education" meant achievement of full potential.

Justice Rehnquist, writing for the five person majority, first tackled the question of what "free appropriate education" was intended to mean by the Congress which had passed EHCA. Finding the definition contained in the Act to tend "toward the cryptic rather than the comprehensive,"[6] he returned to congressional documents and debate to help define the term. There he found distinctions between handicapped students who were "served" by their school system and those who were "unserved." He also found reference to a "basic floor of opportunity" for handicapped children. Thus he concluded that EHCA requires "access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child."[7] Such instruction and services must be provided at public expense, must meet the state's educational standards, must approximate the grade levels used in the state's regular education, and must comport with the child's IEP. The IEP must be "reasonably calculated" to enable the child to achieve passing marks and advance

3. *Id.* at 534.
4. *Id.*
5. *Id.* at 533.
6. Rowley, *supra*, note 1 at 3041.
7. *Id.* at 3048.

from grade to grade.[8] The Court majority concluded that Amy was receiving such a program, noting that she clearly was benefiting from her instruction.

Turning to the second question, the majority rejected the contention that courts should review each case de novo. Instead, courts should ensure that the state has complied with EHCA procedures, such as those requiring parental involvement in IEP development, and then that the IEP be calculated to enable the child to receive educational benefits. If these terms are met, "the courts can require no more."[9]

Justice Blackmun, in a concurring opinion, argued that EHCA required that handicapped children be provided with "equal educational opportunity." He argued that Amy's program provided such an opportunity and voted to overrule the lower courts on that ground. Justice White, joined by Justices Brennan and Marshall, dissented, concluding that EHCA required more than mere "access" to specialized instruction, noting that "a teacher with a loud voice" would satisfy such a requirement.[10] Instead, they argued that Amy would obviously have a greater opportunity to learn with an interpreter. The dissenting opinion, then, took the position that EHCA required equal educational opportunity, rather than just some level of educational benefit, and that the interpreter was required. They also cautioned that the Court's decision would make it much harder for parents to challenge an IEP.

The effect of *Rowley* on the flood of litigation in this area remains to be seen. Clearly, Amy had received significant special services and was performing well academically. It is doubtful, therefore, that the decision could be read as carte blanche support for any IEP developed for a handicapped child. At the same time, as demonstrated in the discussion of other cases in this area which follows, the case should help reduce the contradictory decisions rendered by lower courts on the extent to which extraordinary services must be provided to handicapped students.

4.1a Tuition and Assignment

Cases involving the payment of tuition for handicapped children, often at costly residential schools, generally fall into two categories. In the first group to be discussed, litigation resulted when a student was moved from one educational placement to another while the administrative appeal process contained in EHCA to determine placement still was underway. In the second group are cases in which school districts argue that parents or another governmental agency should pay the tuition because the student's disability is not "educational" in nature.

8. *Id.* at 3049.
9. *Id.* at 3051.
10. *Id.* at 3055.

EHCA contains a provision[11] which has come to be called the "stay-put" requirement. EHCA provides a detailed administrative timetable for challenges to a student's educational placement—a formal due process hearing within forty-five days and state review of the decision within thirty days if it is requested. Students are required to remain in their original placement while the process is being followed. Many challenges, however, take longer than the timetable specifies and lawsuits concerning the payment of tuition during the appeals process are common.

The United States Supreme Court helped clarify the "stay-put" requirement by letting stand a Fourth Circuit Court of Appeals decision denying parents reimbursement for tuition when they unilaterally moved their handicapped child to a private school before any administrative hearing had been held.[12] Other recent cases have offered the same interpretation of the EHCA section. The Third Circuit Court of Appeals rejected the claim by a Delaware school district that they did not have to pay for the tuition of a student enrolled in a private school.[13] The district had sought to return the student to a public school placement and the parents appealed. The student ultimately was enrolled in the public school but the district refused to pay the tuition which was charged for the period while the appeal was taken. The appeals court concluded, however, that the district's obligation to pay the tuition was clear.

The Second Circuit Court of Appeals decision also affirmed the "stay-put" requirement.[14] A New York City student had been placed in a Connecticut residential treatment facility which was subsequently removed from New York State's list of "approved" institutions. While an alternative placement was being sought, and while arguments were raised concerning the nature of the student's handicaps, the New York city and state defendants sought to deny tuition to the student. The court of appeals rejected the attempt and affirmed the preliminary injunction ordering the continued payment which had been issued by a lower court.

In a similar case, an Illinois district court issued a preliminary injunction requiring enough residential facility tuition be paid so that a student would not be discharged while claims raised under EHCA were being litigated.[15] A state appeals court later ruled that EHCA required the

11. 20 U.S.C. § 1415(e)(3) (1976).
12. Stemple v. Board of Educ. Prince George's Cty., 623 F.2d 893 (4th Cir. 1980), *cert. denied*, 450 U.S. 911 (1981).
13. Grymes v. Madden, 672 F.2d 321 (3d Cir. 1982).
14. Vander Malle v. Ambach, 673 F.2d 49 (2d Cir. 1982).
15. Parks v. Pavkovic, 536 F. Supp. 296 (N.D. Ill. 1982).

payment of the full cost of residential treatment.[16] Illinois had sought to charge the parents part of the fee on the grounds that some of the services received by the student were not "educational."

The same Illinois district court ruled, in separate litigation, that parents could not recover tuition costs when they moved their behaviorally handicapped child to a private institution while challenging a proposed placement.[17] A California appeals court also rejected the claims for tuition made by parents who had unilaterally moved their child from one private school to another.[18] And in Massachusetts, an appeals court ordered the payment of residential tuition when parents did not receive formal notice tht the district no longer considered the student to be under their jurisdiction.[19] The court concluded that no change in placement could occur without due process. A New York court also ordered the payment of tuition for a student enrolled in a private school when the parents had not received proper notice of the student's educational evaluation.[20]

Taken as a whole, these cases involving the "stay-put" requirement while placement appeals are being made speak with one voice. Neither parents nor school systems can change placements while due process proceedings are in progress. Only when a system ignores the required proceedings are parents able to claim reimbursement for placements of their own choosing.

Other tuition cases involved disputes over which unit of government was responsible for expensive specialized care for handicapped children. The Stoughton, Massachusetts, school committee challenged a state appeals bureau decision requiring the committee to pay the day portion of tuition for a handicapped high school student.[21] The district court concluded that the committee had an obligation to pay the tuition since it had failed to design an appropriate program for the student. In a comment somewhat at variance with the cases just reported, the court concluded, "Congress did not intend to create a system that would cause a child to stay mired in an inappropriate program while the appellate mechanism slowly determined his fate."[22] An Illinois court also awarded tuition to parents who placed their child in a residential facility before receiving official approval.[23]

16. Parks v. Illinois Dep't of Mental Health, 441 N.E.2d 1209 (Ill. App. Ct. 1982).
17. Mark R. v. Board of Educ., Bremen Commun. High School Dist., 546 F. Supp. 1027 (N.D. Ill. 1982).
18. Newport-Mesa Unified School Dist. v. Hubert, 183 Cal. Rptr. 334 (Cal. Ct. App. 1982).
19. Commonwealth v. School Comm. of Blackstone Valley, 432 N.E.2d 728 (Mass. App. Ct. 1982).
20. New York City Bd. of Educ. v. Ambach, 452 N.Y.S.2d 731 (N.Y. App. Div. 1982).
21. Blomstrom v. Massachusetts Dep't of Educ., 532 F. Supp. 707 (D. Mass. 1982).
22. *Id.* at 713.
23. Walker v. Cronin, 438 N.E.2d 582 (Ill. App. Ct. 1982).

Connecticut sought to avoid payment of tuition for an emotionally disturbed student enrolled in a Massachusetts residential facility, arguing that the placement was for "noneducational reasons."[24] The district court concluded, however, that the institution provided the environment needed for the student to gain needed educational skills and ordered the payment. Finally, in the first of three New York cases, a court of appeals held that the commissioner of education had the power to set tuition rates for schools which had contracted with the state to provide such services.[25] Another appeals court held that parents had to submit claims for tuition reimbursement within the school year for which they were requested,[26] and a third ruled that the New York commissioner could require counties to pay additional residential tuition by promulgating a new rate structure in mid-year.[27] A New York federal district court also ruled that a letter to parents from the school board's attorney was sufficient notice that tuition reimbursement for a private placement was being denied.[28]

Assignment cases involve disputes between parents and schools over the appropriate method of instruction for the handicapped child. Sometimes the disagreement centers on whether residential placement is needed or whether some form of mainstreaming would provide the child with a more "appropriate" education. Parents occasionally contest the IEP prepared for their child, sending courts into lengthy hearings on a particular handicapping condition. While placement cases have not declined in absolute numbers, there is a trend toward acceptance of "reasonable" programs designed for handicapped students (following *Rowley*), rather than the "best."

The First Circuit Court of Appeals held that the *Rowley* issues of "appropriate" or "best" education were not controlling in a case involving the placement of a Massachusetts handicapped child in a residential facility.[29] The child, who suffered from Down's Syndrome, had been institutionalized when a lower court ruled that Massachusetts law clearly required institutionalization. The question of whether or not the state would be required to pay the tuition while the appeal was pending was remanded to the district court.

24. Papacoda v. State of Connecticut, 528 F. Supp. 68 (D. Conn. 1981).
25. Organization to Assure Servs. for Exceptional Students, Inc. v. Ambach, 449 N.Y.S.2d 952 (N.Y. App. Div. 1982).
26. McGaw v. Huntington Hospital, 454 N.Y.S.2d 539 (N.Y. App. Div. 1982).
27. Alban v. County of Nassau, 455 N.Y.S.2d 379 (N.Y. App. Div. 1982).
28. Gregg B. v. Board of Educ. of Lawrence School Dist., 535 F. Supp. 1333 (E.D.N.Y. 1982).
29. Doe v. Anrig, 692 F.2d 800 (1st Cir. 1982).

The Sixth Circuit Court of Appeals heard a dispute centering on two alternative methods for instructing a deaf child.[30] The parents argued that their child would best be served by instruction relying on lip reading, the "aural-oral method." The school system had proposed a "total" approach which also involved the use of sign language. After considering the merits of both approaches, the appeals court affirmed the school district's "total approach" plan, while holding out the possibility that a change might be needed if the student failed to develop needed speech communication skills because of an overreliance on signing. A Pennsylvania district court reached the opposite conclusion in a similar case, ruling that a deaf student should not be mainstreamed and forced to use the aural-oral method until acquiring additional skills.[31]

Litigation continued in the case of a profoundly deaf Arkansas student, whom the Arkansas Department of Education argued would receive an "appropriate education" if the Springdale School District provided her with a certified teacher of the deaf. The district contended that the student would receive the "best" education possible at the state school for the deaf. The district court concluded that the student should be mainstreamed and that EHCA required the local placement.[32] The Eighth Circuit Court of Appeals affirmed[33] but the Supreme Court vacated and remanded the decision,[34] asking that it be viewed in light of *Rowley*. The Eighth Circuit reaffirmed its original decision in a brief order, holding that the local placement would best provide the student with an appropriate education.[35] Further litigation in the case is likely.

A Texas district court was asked to order residential treatment for a severely handicapped child while the school system had proposed a program within the public schools.[36] The child, whom the parents claimed was autistic, had been educated in a residential facility. The school system believed the child was severely retarded and argued that she would make greater educational progress within the system's programs. In resolving these conflicting positions in favor of the system,

30. Age v. Bullitt Cty. Pub. Schools, 673 F.2d 141 (6th Cir. 1982). A Pennsylvania court facing the same issue reached an identical conclusion in Silvio v. Commonwealth, 439 A.2d 893 (Pa. Commw. Ct. 1982).
31. Grkman v. Scanlon, 528 F. Supp. 1032 (W.D. Pa. 1981). This case has since been reversed by the Sixth Circuit Court of Appeals but the opinion is not yet available.
32. Springdale School Dist. v. Grace, 494 F. Supp. 266 (W.D. Ark. 1980).
33. Springdale School Dist. v. Grace, 656 F.2d 300 (8th Cir. 1981).
34. Springdale School Dist. v. Grace, 102 S. Ct. 3504 (1982).
35. Springdale School Dist. v. Grace, 693 F.2d 41 (8th Cir. 1982).
36. Stacey G. v. Pasadena Indep. School Dist., 547 F. Supp. 61 (S.D. Tex. 1982).

the judge acknowledged the "excessive expenditure" involved in residential placement which might deny needed services to other handicapped students. In addition, the court noted the general purpose of EHCA which was to promote mainstreaming whenever possible. The court did, however, order the district to prepare a twelve month program for the student, though no summer program presently exists within the district. In addition, the district was ordered to provide the parents with training to handle their child at home as well as counseling to reduce their emotional stress.

Mainstreaming was also preferred by a Massachusetts federal court in a case involving a retarded, mentally ill and epileptic student.[37] The student had been institutionalized for eight years, but the school committee proposed to provide a special program within the public schools. Drawing heavily on *Rowley*, the court concluded that the student would benefit from and receive an "appropriate" education in the local setting. The parents did receive reimbursement of tuition costs for the period while they were contesting the new IEP prepared for the child.

Deinstitutionalization was also favored by a federal judge in a case involving the Pennhurst State School.[38] Pennhurst has been the subject of continuing litigation since it was first determined in 1977 that the constitutional and statutory rights of residents had been violated. In 1980 a hearing master was appointed and was directed to work toward community placement of those at Pennhurst. While a United States Supreme Court decision[39] remanding the case has continued the litigation, the district court concluded that placement issues could be resolved while other matter were the subject of judicial review. In looking at the case at hand, the court concluded that the master appropriately decided that an institutionalized retarded child could obtain more beneficial servies in a community living arrangement, in spite of his parent's claim that continued institutionalization was needed. The court also refused to stay its order pending appeal.[40]

A North Carolina court approved mainstreaming for a hearing impaired sixth grade student, though the parents favored an out-of-state residential facility.[41] Of special interest in this case were claims made by the parents that a member of the panel which prepared the student's IEP was biased in favor of mainstreaming. The court concluded that

37. Lang v. Braintree School Comm., 545 F. Supp. 1221 (D. Mass. 1982).
38. Halderman v. Pennhurst State School and Hospital, 533 F. Supp. 680 (E.D. Pa. 1982).
39. Halderman v. Pennhurst State School and Hospital, 451 U.S. 1 (1981).
40. Halderman, *supra*, note 38 at 668.
41. Harrell v. Wilson Cty. Schools, 293 S.E.2d 687 (N.C. Ct. App. 1982).

subsequent state review of the decision and the opportunity provided the parents to present their own perspective meant that the panel member's perspective did not constitute sufficient bias to violate due process requirements. Citing *Rowley*, the court approved the mainstreaming plan.

A New Jersey court ordered a school district to pay the residential tuition for a retarded eleven-year-old who had resided in that state since she was two months old.[42] The child lived with foster parents but her natural parents lived in New York. While courts generally assign responsibility for payment in such cases to the parents' district, and look with disfavor on foster parent arrangements for tuition purposes, in this instance the court concluded that EHCA required that the child not be "uprooted" and sent to New York.

The mainstreaming programs presented by school districts were rejected in two federal court cases. In both cases state appeal boards had rejected the district plans. In the first, a Massachusetts court rejected attempts by a school committee to reverse a state decision ordering a private residential day school program for a learning disabled student.[43] The court concluded that the preponderance of evidence supported the placement. In Rhode Island, a district judge concluded that the student-teacher ratio was too high in a "self-contained" classroom created for special eduction students and that a state decision requiring continued residential treatment following an administrative appeal under EHCA wa correct.[44]

A variety of state court cases also raised placement issues. The Supreme Court of Iowa concluded that state law did not require the best or maximum program, but instead, as with EHCA, required an "appropriate" program.[45] A California court ruled that a residential placement was appropriate, even though the state had claimed that the student's problems were related to his home environment.[46] In cases arising in New York, that state's commissioner of education was sustained in his ruling that a child was not handicapped[47] and rebuffed in a ruling requiring one school district to contract with another to provide services to a neurologically impaired child.[48] A New York court also ruled, consistent with decisions in previous years, that the termination

42. Rabinowitz v. New Jersey State Bd. of Educ., 550 F. Supp. 481 (D.N.J. 1982).
43. Norris v. Massachusetts Dep't of Educ., 529 F. Supp. 759 (D. Mass. 1981).
44. Colin K. v. Schmidt, 536 F. Supp. 1375 (D.R.I. 1982).
45. Buchholtz v. Iowa Dep't of Pub. Instr., 315 N.W.2d 789 (Iowa 1982).
46. San Francisco Unified School Dist. v. California, 182 Cal. Rptr. 525 (Cal. Ct. App. 1982).
47. Schoenfeld v. Ambach, 451 N.Y.S.2d 859 (N.Y. App. Div. 1982).
48. Board of Educ. of Greenburgh v. Ambach 453 N.Y.S.2d 895 (N.Y. App. Div. 1982).

of a program for the handicapped in one school and the transfer of students to a similar program elsewhere did not represent "a change in placement" under EHCA.[49] Finally, the Supreme Court of Hawaii resolved a conflict between the EHCA placement appeals process and state administrative processes by ruling that all such appeals must be by civil action following procedures contained in section 1415(e)(2) of EHCA.[50]

4.1b Right to Education and Related Services

Right to education cases involving handicapped students fell into two distinct categories in 1982. The first to be discussed in this section involve class action suits claiming that states have failed to provide services to the handicapped, thereby violating EHCA or state statutory provisions. The second group of cases concern claims for additional or "related" services under EHCA. School systems are reluctant to provide medical assistance to handicapped students, or schooling beyond 180 days, while parents claim that EHCA requires such treatment.

A 1980 class action suit on behalf of handicapped children in New Mexico resulted in a district court injunction requiring the provision of services to the students.[51] The three-judge court concluded that section 504 of the 1973 Rehabilitation Act provided a private right of action to the parents, though the state had elected not to receive EHCA funds. New Mexico appealed the case to the Tenth Circuit Court of Appeals.[52] The state claimed that the section 504 claims were premature because the plaintiffs did not first exhaust their administrative remedies by filing claim with a state agency, nor did they wait for the Federal Office of Civil Rights to investigate the charges. The appeals court rejected these arguments. Focusing next on the substance of the section 504 arguments, the court turned to the Supreme Court's decision in *Southeastern Community College v. Davis*[53] for guidance. The appeals court concluded that *Southeastern* interpreted section 504 as prohibiting discrimination against the handicapped, rather than requiring affirmative action programs for them. The record from the district court was insufficient to determine whether such discrimination had occurred, however, and the case was remanded. The Tenth Circuit

49. Cohen v. Board of Educ., N.Y.C., 454 N.Y.S.2d 630 (N.Y. App. Div. 1982).
50. *In re* Eric C., 649 P.2d 1140 (Hawaii 1982).
51. New Mexico Ass'n for Retarded Citizens v. New Mexico, 495 F. Supp. 391 (D.N.M. 1980).
52. New Mexico Ass'n for Retarded Citizens v. New Mexico, 678 F.2d 847 (10th Cir. 1982).
53. 442 U.S. 397 (1979).

Court asked the district court to consider whether the New Mexico programs precluded the handicapped from enjoying benefits realized by the nonhandicapped, whether program modifications would result in the handicapped receiving such benefits, and whether such modifications would jeopardize the overall viability of the state's educational system. These major issues now await rehearing.

Litigation involving alleged inconsistencies between Nebraska statutory provisions for challenging the placement of handicapped children and the relevant EHCA placement provisions continued to travel between the Eighth Circuit Court of Appeals and the district court. The district court had settled one issue in 1980, concluding that the Nebraska commissioner of education did not have the power to review the placement decisions made by independent state hearing officers.[54] The Eighth Circuit let the lower court's injunction against the practice stand,[55] but remanded the bulk of the case. The case was subsequently dismissed without prejudice[56] because the Nebraska statute regarding the role of the hearing officer had been changed to conform to EHCA requirements. The plaintiffs appealed this decision but it was affirmed by the Eighth Circuit, which also concluded that the original placement controversy which initiated the litigation must first be the subject of an administrative appeal before it was ripe for adjudication.[57] The appeals court also reviewed *Rowley* and *Southeastern* before concluding that EHCA now required only "an adequate education, not necessarily the kind of education necessary to maximize each handicapped child's personal development."[58] Thus the lower court was correct in dismissing the bulk of the case, leaving only the question of attorney fees for one of the plaintiffs unresolved.

Two 1982 decisions addressed the treatment of handicapped children in state institutions. A 1978 consent decree was at issue in a Massachusetts case.[59] The agreement called for negotiations between organizations representing retarded citizens and agents for the state, whenever staff cuts were proposed at state institutions for the retarded. The district court was to referee the discussion. A proposed staff cut of 408 persons was reviewed by the court under this agreement and it was held that such a reduction would pose a threat to the care of the institutionalized clients. A limited number of specified reductions were permitted by the court, however. And in the State of Washington, a claim

54. Monahan v. Nebraska, 491 F. Supp. 1074 (D. Neb. 1980).
55. Monahan v. Nebraska, 645 F.2d 592 (8th Cir. 1981).
56. Rose v. Nebraska, 530 F. Supp. 295 (D. Neb. 1981).
57. Monahan v. Nebraska, 687 F.2d 1164 (8th Cir. 1982).
58. *Id.* at 1170.
59. Ricci v. Okin, 537 F. Supp. 817 (D. Mass. 1982).

for the return of $83,000,000 collected by the state from institutionalized clients and their guardians for their care since 1967 was rejected, though some of the notices used to make the collections needed to be modified.[60]

In 1980, a district court held that the State of New York's commissioner of education violated EHCA and the New York education law by issuing a rule defining handicapped children as those who exhibit a discrepancy of fifty percent or more between expected and actual achievement, and by taking away the power of local committees on the handicapped to assign students to residential treatment facilities at state expense.[61] The commissioner appealed the decision. The Second Circuit Court of Appeals reviewed the decision and declined to reach the merits of the claims, reversing instead because the parents bringing the original suit had failed to exhaust administrative remedies.[62] The appeals court noted that EHCA required only that "a severe discrepancy" exist between actual and potential performance, but that the record failed to show how the proposed fifty percent test would relate to the EHCA standard. This would be clearer, the court reasoned, if an actual appeal concerning a student placement were pursued. While finding the absolute ban on residential treatment to be a "much closer issue," the court noted that "the commissioner might reverse himself in a compelling case, if he were proved wrong."[63] Thus the case was dismissed without prejudice, inviting further litigation on both issues.

Injunctive relief sought on behalf of epileptic children in Kansas was denied by a district court.[64] The plaintiffs alleged that the policies of the Kansas commissioner of education and the Wichita school superintendent regarding the screening and programming for epileptic children violated the provisions of EHCA, section 504, and other state and federal requirements. Lengthy testimony was heard by the court on the nature of epilepsy and on the ways this condition might be addressed. While finding that the trial itself "was a learning experience for all involved, and will lead to further improvements," the court concluded that the plaintiffs failed to meet the burden of proof both for class certification and for injunctive relief.

Each year at least one catheterization case appears in this section. EHCA requires that handicapped students be provided with "related services" which make the receipt of a free and appropriate education

60. Foundation for the Handicapped v. Department of Social and Health Servs., 648 P.2d 884 (Wash. 1982).
61. Riley v. Ambach, 508 F. Supp. 1222 (E.D.N.Y. 1980).
62. Riley v. Ambach, 668 F.2d 635 (2d Cir. 1981).
63. *Id.* at 642.
64. Akers v. Boltan, 531 F. Supp. 300 (D. Kan. 1981).

possible. Following the holdings of a Fifth Circuit case,[65] the Third Circuit Court of Appeals ordered a school system to provide the catheterization of a Pennsylvania elementary school student.[66] Taken together, these ruling may settle this narrow issue.

An Ohio district court considered an array of requests from the parents of a severely handicapped student who functions at a "pre-academic level."[67] The court concluded that the school system did not have an obligation "to provide any and all services that might be beneficial" or "experiment with every new teaching technique that may be suggested."[68] Thus a variety of requested services, including a public education until the student reached age twenty-nine, were denied. The court did hold, however, that the student had the right to participate in after-school activities. A New York district court also addressed the question of additional services, concluding that a physically handicapped student did not have the right to participate in a school-sponsored trip to Spain under the requirements of section 504.[69]

4.1c Discipline

Cases involving the suspension or expulsion of handicapped children continue to be filed. A Fifth Circuit case decided in 1981[70] established the principle that an expulsion of a handicapped student represented a "change of placement" which could be undertaken only after an administrative review process considered the relationship between the misbehavior and the student's handicaps. The Sixth Circuit Court of Appeals considered a similar case in 1982 when it affirmed a lower court decision ordering an expelled handicapped student readmitted to school.[71] The student, a fifteen-year-old ninth grade student in an educable mentally handicapped program, had struck and kicked his teacher. He was subsequently expelled, with the school board arguing that his expulsion was not a change in placement and that the Kentucky expulsion statute applied with equal force to handicapped and nonhandicapped students. Failure to expel, they pleaded, would create a double standard for student conduct.

The appeals court disagreed with the board's arguments. Noting that no evaluation of the link between the assault and the student's handicap had been considered, the court concluded that EHCA required

65. Tatro v. Texas, 625 F.2d 557 (5th Cir. 1980).
66. Tokarcik v. Forest Hills School Dist., 665 F.2d 443 (3d Cir. 1981).
67. Rettig v. Kent City School Dist., 539 F. Supp. 768 (N.D. Ohio 1981).
68. *Id.* at 777.
69. Wolff v. South Colonie Cent. School Dist., 534 F. Supp. 758 (N.D.N.Y. 1982).
70. S-1 v. Turlington 635 F.2d 342 (5th Cir. 1981).
71. Kaelin v. Grubbs, 682 F.2d 595 (6th Cir. 1982).

the diagnostic evaluation. This did not create a double standard, the court reasoned, because only the procedural safeguards for removing a handicapped child were different. The student could still be temporarily suspended, so long as the *Goss v. Lopez*[72] suspension procedures were followed. And permanent exclusion would be possible if the misbehavior was unrelated to the handicap. To allow traditional expulsion procedures in cases involving handicapped children would risk "eviscerating" the concept of individualized educational planning for handicapped children, the court reasoned.

A group of Maryland parents filed suit seeking to prevent the removal of their children from school because of behavior problems they alleged were related to their handicaps.[73] The parents argued that misbehaving handicapped children must be retained in their current placements while evaluation panels considered a change. The school systems, on the other hand, proposed that parents contest disciplinary removals in the EHCA administrative appeals process after the exclusion had occurred. The court decided that an administrative appeal represented "a quick and inexpensive determination" that a disciplinary action was or was not related to a student's handicap. Thus the court said it would not hear any case on the subject until the Maryland administrative process had been exhausted.

An Illinois case raised questions about a school suspension after an impartial hearing officer had concluded that a student's verbal abuse of his teacher was unrelated to his handicap.[74] The state superintendent, however, reversed the hearing officer's decision and the school board filed suit. In a tart decision, the district court overruled the state superintendent and reinstated the suspension, noting that the superintendent had engaged in "sophistry" by equating a short term suspension with a permanent expulsion. The court found the superintendent's concern for harm to the student "can only be recognized as pure imagination, or a feeble attempt at rationalization of a preconceived notion that handicapped students, whatever the degree of handicap, are free of classroom discipline."[75]

Another case from Illinois featured a claim by parents that their son should not have been suspended for carrying a knife in school because he should have been classified as handicapped.[76] Assorted fourth

72. 419 U.S. 565 (1975).
73. H.R. v. Hornbeck, 524 F. Supp. 215 (D. Md. 1981).
74. Board of Educ. of Peoria v. Illinois State Bd. of Educ., 531 F. Supp. 148 (C.D. Ill. 1982).
75. *Id.* at 150.
76. Reineman v. Valley View Commun. School Dist. No. 365-U, 527 F. Supp. 661 (N.D. Ill. 1981).

amendment and damage issues were also a part of the litigation. The student, who had received some thirty internal and external suspensions prior to the knife incident, was not determined to be handicapped until January, 1981, two months after his suspension. His parents argued, however, that the school system was two years late in classifying him as handicapped. The district court dismissed all the plaintiff's claims, holding that state court action on the knife seizure precluded several of them, and that EHCA and section 504 claims could not be reached. The court left standing the plaintiff's section 1983[77] claim against the Village of Bolingbrook, Illinois Police Department, while warning the plaintiffs that they now had a responsibility for proving that the village actually has a custom of making false arrests, as their suit alleged. This case has since been appealed to the Seventh Circuit Court of Appeals.

4.1d Attorney Fees and Damages

The large number of cases involving handicapped children decided in recent years have spawned additional suits focusing on the questions of attorney fees and damages. These cases were so numerous in 1982 that they now require discussion in a separate part of this section. Most of the attorney fee cases claim payment for counsel to prevailing parents under one or a combination of the following: Provisions of EHCA, section 504 and section 505 of the Rehabilitation Act of 1973, the Civil Rights Attorney's Fees Award Act[78] and various state statutes.

Much of the law in this area is unsettled, as demonstrated by the variety of holdings in the cases that follow. It has generally been agreed that EHCA does not provide grounds for either fees or damages. Some courts, however, have allowed parallel claims filed under sections 504 and 505 of the Rehabilitation Act. Other decisions have held that Congress would have placed a fee or damage section within EHCA, had it intended such remedies to be available. Courts are also mixed in their application of sections 1983 and 1988 of the Civil Rights Attorney's Fees Award Act. That Act allows claims when constitutional violations are alleged and has sometimes been applied when acts of Congress are challenged. Whether the issues raised by parties in handicapped litigation qualify under section 1983 is frequently argued in the cases that follow.

A 1981 Seventh Circuit Court of Appeals case[79] has helped to structure the cases in this area because its interpretation of the remedies in

77. 42 U.S.C.A. § 1983 (1976).
78. 42 U.S.C.A. §§ 1983, 1988 (1976).
79. Anderson v. Thompson, 658 F.2d 1205 (7th Cir. 1981).

EHCA has come to be widely accepted. The Seventh Circuit concluded that EHCA could not be used as a base for making fee and damage claims since the Act did not contain a traditional damage remedy section. Instead, the "appropriate relief" which EHCA permits courts to grant was to be restricted to injunction regarding a child's program or placement. The Seventh Circuit left only two "exceptional circumstances" where damages might be awarded—where the child's health was risked or where the defendant acted in extreme bad faith by failing to comply with EHCA procedures.

Most damage and fee cases present complicated claims based on more than just EHCA. In one such case, the Supreme Court let stand an Eighth Circuit Court of Appeals decision remanding a damage claim, after requesting more arguments on the use of section 1983 as a remedy for violations of section 504 and EHCA.[80] While agreeing with the previous case in holding that EHCA itself does not provide a course of action for damages, the appeals court concluded that damages could be awarded under section 504. While the Eighth Circuit found that the eleventh amendment provided immunity to some of the named defendants, the bulk of the case was remanded for further arguments. The decision allowed further debate on the parents' claim for $524,000 filed against the St. Louis district.

A lower court decision awarding attorney fees on a proportional basis from state and local defendants was upheld by the Second Circuit Court of Appeals.[81] The complicated class action suit which culminated in the fee request had generated attorney fees in excess of $200,000 and had been settled in the plaintiff's favor. The State of New York, which ultimately was held responsible for twenty percent of the fees while New York City paid eighty percent had tried to argue that all state administrative remedies in addition to those under EHCA had to have been pursued before fees could be awarded. This argument was rejected, given the large number of handicapped students involved. The fee award was based on section 1983, with the court holding that the city and state had failed to meet statutory and constitutional obligations under both EHCA and section 504.

The Eighth Circuit Court of Appeals also awarded fees for a successful EHCA claim based on section 1983.[82] The defendants argued that EHCA contained no fee provision, a point with which the appeal court agreed. Nevertheless, the Eighth Circuit made the award after

80. Miener v. Missouri, 673 F.2d 969 (8th Cir. 1982), *cert. denied*, 51 U.S.L.W. 3013 (1982).
81. Jose P. v. Ambach, 669 F.2d 865 (2d Cir. 1982).
82. Robert M. v. Benton, 671 F.2d 1104 (8th Cir. 1982).

noting that the plaintiffs had also presented nonfrivolous claims under the fourteenth amendment and section 504. While these were not the basis for the lower court's decision, the appeals court reasoned that the outcome in the case would have been the same had these grounds been reached. Therefore the fee payment was ordered.

The Fourth Circuit also confronted a fee case and approved a partial payment.[83] First, the court wrestled with the EHCA fee question and concluded, as have the other circuits, that EHCA did not provide a means for obtaining fees. Nevertheless, in the case at hand, the prevailing party had to go to court to obtain a student's return to the classroom pending a hearing. This, the Fourth Circuit concluded, was an attempt to preserve "rights, privileges, or immunities secure by the Constitution and laws," as provided for in 42 U.S.C. section 1983. Therefore section 1988 mandated fees for the court hearing only, and not for the legal assistance in the EHCA administrative hearings that followed. The appeals court also allowed fees for the preparation of arguments made on behalf of the fee payment. In another case, looking at a similar issue, a New York district court rejected the payment of fees to attorneys representing defendants solely in successful state administrative proceedings.[84]

Illinois plaintiffs who raised "substantial constitutional claims" as well as EHCA issues received $65,000 in attorney fees in a settlement.[85] The court concluded that constitutional claims made payment under section 1988 possible. The case presented other issues, since the successful attorneys were representatives of legal services organizations receiving public funding. While the state claimed that this represented grounds for denying the request, the court concluded that "well-settled" law led to the opposite conclusion and allowed attorney's fees. Attorneys were not granted fees for preparing their fee petitions, however.

A Rhode Island case also led to an award of fees under section 1988.[86] The district court allowed the award for representation during EHCA proceedings, reasoning that the plaintiffs had a "substantial" constitutional claim which could not be adjudicated until the EHCA proceedings had been terminated. The plaintiff's section 504 claim was rejected, however, and plaintiffs received no attorney's fees for making Rehabilitation Act arguments. The district court based this ruling on the fact that the parents were asking for a private school placement for their child which could not be granted under section 504, and that

83. Hymes v. Harnett Cty. Bd. of Educ., 664 F.2d 410 (4th Cir. 1981), *reh'g denied*, (1982).
84. Noe v. Ambach, 542 F. Supp. 70 (S.D.N.Y. 1982).
85. Gary B. v. Cronin, 542 F. Supp. 102 (N.D. Ill. 1982) (fee issue).
86. Turillo v. Tyson, 535 F. Supp. 577 (D.R.I. 1982).

section 504 claims could be made only when all EHCA administrative proceedings had been concluded. An Illinois district court also denied an injunction request seeking damages and fees under a variety of acts until administrative appeals had been exhausted.[87]

Section 1988 was used by a Hawaii district court to permit the payment of attorney fees related to an EHCA appeal.[88] In this instance, in a decision running counter to those just discussed, the court concluded that EHCA was a "comprehensive enforcement scheme" and therefore permitted payment of fees for an administrative appeal. The parents were considered to be a "prevailing party" after the state agreed to pay the tuition for a residential placement.

Several 1982 attorney fee cases hinged principally on Rehabilitation Act claims. The Fourth Circuit Court of Appeals affirmed an award of fees made by a district court based on the Rehabilitation Act.[89] The appeals court agreed that the settlement in the case made the parents the prevailing party, the point which the state had contested. A District of Columbia court, while finding case law in the area "inconclusive, at best," also awarded fees to parents based on section 505.[90] The court confronted the question of whether a section 505 claim can be made in a case where the principal arguments centered on EHCA. After a look at legislative histories, the district court concluded that section 505 was not explicitly limited to cases brought only under the Rehabilitation Act. Instead, section 505 was constructed to benefit handicapped children generally, and therefore could be used to claim attorney fees in EHCA proceedings.

In two related cases, a federal court ruled that a hearing officer cannot assign financial responsibility for tuition costs in cases brought under the Rehabilitation Act of 1973.[91] The same court also awarded attorney fees in the case,[92] noting that the parents had used a section 504 claim to compel the school district to hold a placement hearing, even though they did not prevail in their claims. The mere holding of the hearing was a right to which the parents were entitled and required the payment.

While fees have often been granted, the award of damages in handicapped cases is a comparative rarity. A Rhode Island case involving a tuition claim for a student with dyslexia was settled in favor of the state.[93] The district court found that the student had graduated, thus

87. Calhoun v. Illinois State Bd. of Educ., 550 F. Supp. 796 (N.D. Ill. 1982).
88. Department of Educ. v. Valenzuela, 524 F. Supp. 261 (D. Hawaii 1981).
89. Pratt v. Board of Educ. of Frederick Cty., 674 F.2d 259 (4th Cir. 1982).
90. Patsel v. District of Columbia Bd. of Educ., 530 F. Supp. 660 (D.D.C. 1982).
91. Davis v. District of Columbia Bd. of Educ., 530 F. Supp. 1209 (D.D.C. 1982).
92. *Id.* at 1215.
93. Jaworski v. Rhode Island Bd. of Regents for Educ., 530 F. Supp. 60 (D.R.I. 1981).

rendering all claims except those under EHCA moot. The Rhode Island court then drew heavily on the Seventh Circuit[94] to conclude that EHCA contained no damage remedy. As to the fourteenth amendment claim advanced by the parents, the court cited *Carey v. Piphus*[95] as authority for the position that proof of actual injury must be shown before an award for a constitutional violation could occur. The school committee's failure to hold a timely hearing, then, resulted in the assessment of one dollar in damages.

Parents of a Texas student claimed that their school district acted in bad faith and endangered the health of their child through an improper placement.[96] The disputed placement was changed by a hearing officer and the parents then filed a substantial claim for damages under EHCA, section 504 and the fourteenth amendment. The plaintiffs requested a summary judgment, which was denied. The court did accept the defendant's motion to dismiss EHCA and section 504 actions, concluding that neither offered a private damage remedy in this instance. The case was then remanded to determine if, in fact, the student was handicapped at the time the allegedly improper placement occurred.

An Illinois damage case was continued when all dismissal motions were denied.[97] The court found sufficient facts to advance a claim that "exceptional circumstances" warranted the student's parents decision unilaterally to place him at a private residential institution. Significant section 504 and EHCA claims remain for trial, but the court did dismiss a $525,000 general damage claim on the grounds that tort damages were foreclosed under EHCA.

A district court in Hawaii granted both tuition costs and fees in a case involving a four-year-old handicapped child.[98] The court distinguished between the tuition award it was making and other forms of damages, which would not be permitted, citing an Eighth Circuit case which made the same distinction.[99] Once concluding that tuition damages were appropriate and that the student's statutory rights had been violated, the district court used sections 1983 and 1988 to award attorney fees. The district court drew on a recent Supreme Court case in ordering fees paid for an administrative appeal.[100]

94. Anderson v. Thompson, 658 F.2d 1205 (7th Cir. 1981).
95. 435 U.S. 247 (1978).
96. Ruth Anne M. v. Alvin Indep. School Dist., 532 F. Supp. 460 (S.D. Tex. 1982).
97. William S. v. Gill, 536 F. Supp. 505 (N.D. Ill. 1982).
98. Department of Educ., State of Hawaii v. Katherine D., 531 F. Supp. 517 (D. Hawaii 1982).
99. Monahan v. Nebraska, 491 F. Supp. 1074 (D. Neb. 1980), *aff'd*, 645 F.2d 592 (8th Cir. 1981).
100. New York Gaslight Club v. Carey, 447 U.S. 54 (1980).

In an unusual case which allowed parents to receive $50,000 in damages from a jury, a New York district court held that first amendment claims arising from a handicapped placement were valid.[101] The court first concluded, following arguments similar to other cases in this section, that EHCA contained no provisions for obtaining damages and that section 1983 was inapplicable because EHCA had no damage section. The court also held that section 504 claims could not be made until all administrative appeals under EHCA were exhausted, citing a recent Rhode Island case as support for that approach.[102] The New York court did, however, let stand the plaintiff's first amendment claim that the school system had harassed them in retaliation for their filing of the lawsuit in the case. The court found the first amendment claim to be "valid" and let the jury make the award.

A Montana Supreme Court case considered the question of liability for an improper placement of a handicapped child under state statutes.[103] Without reaching the merits of the parents' claim, the court held that such claims could not be rejected on the ground of sovereign immunity, noting that the Montana Constitution abolished sovereign immunity except where the legislature enacts contrary legislation by a two-thirds vote. The divided court did, however, affirm dismissal of the parents' due process claims.

The Rhode Island Supreme Court considered a variety of claims filed by parents seeking damages because a psychiatric report had been released to persons not connected with the case in violation of a state act.[104] In remanding the case, the court concluded that the damage claims could be joined with the issues still pending. Finally, in a per curiam decision, a Florida appeals court concluded that no cause of action was stated when parents filed an educational malpractice suit alleging their child had been placed in an improper special education program.[105]

4.2 PUBLIC SCHOOL ASSIGNMENT, TUITION AND TRANSPORTATION

4.2a Tuition and Assignment

School districts facing declining tax support sometimes resort to fee charges as a means of raising revenues. In a case challenging one such

101. Davis v. Maine Endwell Cent. School Dist., 542 F. Supp. 1257 (N.D.N.Y. 1982).
102. Turillo v. Tyson, 535 F. Supp. 577 (D.R.I. 1982).
103. B. M. v. Montana, 649 P.2d 425 (Mont. 1982).
104. Chase v. Mousseau, 448 A.2d 1221 (R.I. 1982).
105. Tubell v. Dade Cty. Pub. Schools, 419 So. 2d 389 (Fla. Dist. Ct. App. 1982).

fee, a California appeals court struck down a system which charged students from $25 to $44 for each extracurricular activity.[106] The fee was assessed for participation in after-school activities, such as sports, orchestra, drama and choral programs. Many of the activities were associated with high school classes in which graduation credits were given.

In deciding the case, the appeals court focused on a section of the California Administrative Code which prohibited fees "unless specifically authorized by law."[107] The court concluded that the code prohibited the charging of fees for extracurricular activities, adding that the activities in question were also linked to the "essence" of academic courses. Because the activities used school facilities and personnel, it was not possible to separate them from the regular program. Having decided the case on state grounds, the court declined to discuss the fourteenth amendment questions raised by the plaintiffs.

The Supreme Court of Nebraska considered a case in which the state board of education had ordered a school district to pay the tuition costs for several students to attend school in South Dakota.[108] The students resided near the state border and the South Dakota school was twenty miles closer than the one in Nebraska operated by the district which filed the appeal. The court dismissed the appeal when it determined that the case had been filed in the county where the state board had rendered its decision, rather than in the county where the disputed claim arose.

In a typical boundary dispute, a Massachusetts appeal court considered a case in which the school district line went through the living room of the plaintiff's home.[109] Testimony in the case revealed that two children slept in one town while a third slept in the other. The court split the issues it faced, concluding that the students were residents of the town in which the largest percentage of the house was located. However, it refused to award recovery of tuition costs for the education the students had received while attending the wrong school, since the attendance was based on good-faith assumptions about which school district the children should have attended.

106. Hartzell v. Connell, 186 Cal. Rptr. 852 (Cal. Ct. App. 1982).
107. CAL. ADMIN. CODE tit. V, R. 350.
108. Board of Educ. of Keya Paha Cty. v. State Bd. of Educ., 323 N.W.2d 89 (Neb. 1982). The Nebraska Court also interpreted that state's law on tuition payments in cases where property is transferred. *In re* Freeholder's Petition, 317 N.W.2d 91 (Neb. 1982).
109. Teel v. Hamilton-Wenham Reg. School Dist., 433 N.E.2d 907 (Mass. App. Ct. 1982).

4.2b Transportation

Recent cases involving transportation have been created by school board decisions to reduce bus service as a response to shrinking school revenues. Several suits challenging such reductions were heard, including a Pennsylvania case decided in 1981[110] which was appealed to the Third Circuit Court of Appeals.[111] The district court had issued an injunction against the decision by the Albert Gallatin Area School District to provide only one-way transportation for kindergarten pupils. The students received half-day instruction and the district had decided not to provide noontime bus service to those students who were starting or finishing their programs at that time. The district court held that the arrangement created a "suspect classification" in violation of the fourteenth amendment.

The lower court's equal protection reasoning was rejected by the appeals court and the case was remanded for a consideration of state issues. The Third Circuit rejected the district court's use of the suspect class test to determine if a fourteenth amendment violation had occurred. The lower court had concluded that education was a fundamental right and that students from lower income families could not afford the new bus service, thereby creating a suspect class based on wealth. Citing *San Antonio v. Rodriguez*,[112] in which the Supreme Court had squarely rejected both contentions, the Third Circuit concluded that the less rigorous "rational basis" test for weighing fourteenth amendment claims should be used in the case. The court then concluded that the school board's decision, in the face of limited funds, was not irrational. The case has since been appealed to the United States Supreme Court.

Similar reasoning was used by a Michigan appeals court to reject a request for bus service filed by parents in the Cadillac Area Public Schools.[113] Following defeat of a proposed mill rate increase by district voters, the school board ordered a halt to bus transportation for students living in excess of one and a half miles from the school. The court cited *Rodriguez* as justification for concluding that the decision had a rational basis. Looking at state statutes, the court concluded that Michigan law made bus transportation permissive rather than mandatory.[114] The subsequent passage of a mill rate increase by district

110. Shaffer v. Board of School Dirs., 522 F. Supp. 1138 (W.D. Pa. 1981).
111. Shaffer v. Board of School Dirs., 687 F.2d 718 (3d Cir. 1982).
112. San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973).
113. Sutton v. Cadillac Area Pub. Schools, 323 N.W.2d 582 (Mich. Ct. App. 1982).
114. The New York Court of Appeals also concluded, in a separate case, that the commissioner of education in that state had not been arbitrary in ruling that a student could be denied bus transportation. Gudrum v. Ambach, 448 N.Y.S.2d 466 (N.Y. 1982).

voters has since made the issue moot for the students involved. Students denied bus service in another Michigan district, however, also had their claims rejected when an appeals court held that bus service was not mandatory.[115]

The Kansas Supreme Court considered a case in which a school district had received a ruling from the Attorney General compelling them to provide bus transportation.[116] The district argued that state law permitted them the option of reimbursing parents at a reasonable rate per mile in lieu of providing bus transportation, and had cancelled bus service in a large area of the district. The Attorney General contended that reimbursement was possible under the statute only if a student resided at some distance from a bus route or if it was impractical to schedule a route to serve the student. The court concluded, however, that state law left school boards substantial latitude in cancelling routes and approved the payment plan.

A West Virginia Supreme Court of Appeals decision ordered the provision of bus service to students living on gravel roads in Logan County.[117] The school district had treated student absences caused by the impassable roads as "unexcused." The West Virginia court concluded that both the school district and the state department of highways had denied the students their equal protection rights by failing to provide alternate methods of transportation and by not maintaining the roads adequately. In another case, similar equal protection and state claims were rejected when a Florida student voluntarily elected to attend school outside of her attendance zone and was denied transportation by a school board.[118]

Two transportation decisions made by the Rhode Island Commissioner of Education and affirmed by the state board of regents were consolidated and heard by the Rhode Island Supreme Court.[119] The decisions considered whether the routes travelled by students were impractical or hazardous, thereby requiring bus service under state statute. The court concluded that the commissioner's decision ordering the transportation in one case was appropriate but remanded the other case for rehearing because the commissioner had rendered a decision before holding a public hearing on the matter.

In a case which attracted substantial national attention, the First Circuit Court of Appeals sustained a lower court decision allowing the

115. Lintz v. Board of Educ., Alpena Pub. Schools, 325 N.W.2d 803 (Mich. Ct. App. 1982).
116. Kansas v. Board of Educ. of Barton Cty., 647 P.2d 329 (Kan. 1982).
117. Potter v. Miller, 287 S.E.2d 163 (W. Va. 1982).
118. School Bd. of Leon Cty. v. Ehrlich, 421 So. 2d 18 (Fla. Dist. Ct. App. 1982).
119. Brown v. Elston, 445 A.2d 279 (R.I. 1982).

Nashua, New Hampshire board of education to suspend bus routes when pupils riding the buses became unruly.[120] Plaintiffs in the case claimed their children were treated unfairly because they were not among the small percentage of the students in the bus who were troublemakers. They claimed that the New Hampshire busing law violated the fourteenth amendment because it allowed hearings after a suspension but not beforehand. In rejecting this claim, the First Circuit concluded that the New Hampshire law guaranteeing bus transportation did not promise suspension-free service. The court applied a reasonableness test to the policy and concluded that the safety issues involved were sufficient to justify the suspensions, adding that blanket punishment for the violations of a few is "fairly common in the world of school discipline."[121]

4.2c Compulsory Attendance

Compulsory attendance cases in 1982 raised questions concerning attempts by parents to educate their children at home, rather than sending them to a public or private school. Most states permit such arrangements, provided that parents meet certain statutory requirements. These requirements were challenged, with parents claiming that religious or other grounds exempted them from meeting "equivalent instruction" or certified teacher regulations. *Yoder v. Wisconsin*,[122] which held that requiring Amish children to remain in school past the eighth grade violated their free exercise of religion, was frequently cited by those seeking home instruction, but courts showed a reluctance to use the case as authority for ignoring compulsory attendance laws.

A variety of Christian fundamentalist groups raised these issues in a Maine case, claiming that the state's compulsory attendance laws violated the first, ninth and fourteenth amendments.[123] Thus the district court was forced to wade through an array of constitutional claims. At the heart of the case, the plaintiffs claimed that the state requirement on compulsory attendance was overbroad and that the requirement that students receive "equivalent instruction" was too vague. Maine law permits the commissioner of education to "prescribe the course of study" for students and to deny authorization of a course of study "for cause."[124] Cause, however, was not defined, and could

120. Rose v. Nashua Bd. of Educ., 679 F.2d 279 (1st Cir. 1982).
121. *Id.* at 282.
122. 406 U.S. 205 (1972).
123. Bangor Baptist Church v. Maine, 549 F. Supp. 1208 (D. Me. 1982).
124. 20 ME. REV. STAT. ANN. § 102.7 (1981).

conceivably collide with the plaintiffs' first amendment rights. Thus the court denied the defendant's request for a summary judgment on the vagueness claim and called for more hearings. The bulk of the issues, however, including the arguments concerning the law itself, the equivalent instruction requirement, and certain reporting requirements which allowed the commissioner to obtain information about programs, were decided in favor of the state. Summary judgment was granted, then, on these issues.

A 1951 law giving local school superintendents the power to approve home teaching programs and to require "qualified" instructors was upheld by the West Virginia Supreme Court of Appeals.[125] The parents claimed the public schools taught religious "heresy," and they raised first amendment claims, citing *Yoder*, when they were prosecuted under truancy laws. The court rejected the plaintiff's first amendment claims, noting that *Yoder* addressed a well-organized religious community which permitted at least partial schooling. The West Virginia Supreme Court concluded by stating, "this Court holds that sincerely held religious convictions are never a defense to total noncompliance with the compulsory school attendance law."[126] To rule otherwise, the court noted, was "a potential challenge to basic literacy."

An Alabama court upheld a state law requiring home instructors to hold public teaching certificates.[127] The parents who filed the suit were members of the Society of St. Pius X and believed that it would be a mortal sin if their children's religious salvation were endangered by exposing them to a secular education. After assessing the parents' *Yoder* claims, the court concluded that, in contrast to the Wisconsin case, the Alabama defendants failed to show how a secular education endangered the religious values of the children involved.

Oregon law contains an exemption from compulsory attendance which permits children to be taught the courses in grades one through twelve by a parent or private teacher.[128] This arrangement must be approved by the school district's executive officer and the students involved must take examinations prepared by the Oregon State Board of Education. Parents challenged the exemption on the ground that it was unconstitutionally vague.[129] They also claimed that private school students were subjected to different standards than those taught at home. The appeals court found that the statutory exemptions "are not models of legislative clarity" but upheld their constitutionality. The

125. West Virginia v. Riddle, 285 S.E.2d 359 (W. Va. 1981).
126. *Id.* at 365.
127. Jernigan v. Alabama, 412 So. 2d 1242 (Ala. Ct. App. 1982).
128. OR. REV. STAT. § 339.030(2)(6).
129. Oregon v. Bowman, 653 P.2d 254 (Or. Ct. App. 1982).

court concluded that the parents knowingly failed to send their child to school when asked to do so by the superintendent, and added that the superintendent did not have the responsibility to notify the parents that his decision could be appealed to the local school board.

Exemptions to the compulsory attendance statute were also at issue in a case heard by the Supreme Court of New Hampshire.[130] New Hampshire permits home instruction if it would provide the student with special benefits or if educational hardship would result from attendance.[131] The court concluded that these standards were permissive, not mandatory as the parents had claimed. Therefore the state board of education was not required to provide them with an exemption. The case was remanded, however, because the statute required that parents be provided with written recommendations on how the deficiencies of their home instruction might be remedied. This step had not been followed. The court went on to suggest the school board tell the parents that the deficiencies in their home program could not be remedied so long as the parents were the "instructors." In a similar case, a Wisconsin appeals court concluded that the definition of "private school" in that state's attendance statute was not unconstitutionally vague.[132] Therefore the parents' claim that their home was a private school was rejected. A Florida court addressed the same claim and reached an identical conclusion.[133]

Contrary to these cases, an appeals court did find in favor of parents seeking home instruction in one appeal.[134] A Missouri court concluded that the burden was on the state to prove that the home tutoring was not "equivalent." In an added twist, the court suggested that the parents could invoke a self-incrimination defense and refuse to answer questions about their home program. Thus it appears that any home instruction would be permitted under this ruling. An Alabama court, however, reached the opposite conclusion, finding that the state's compulsory attendance law did not impermissibly shift the burden of proof from the state to the defendants.[135]

Only one immunization case was recorded in 1982. The Maryland Court of Appeals held that the state immunization statute violated the establishment clause of the first amendment, but that the invalid portion could be severed from the rest of the statute, thus leaving it in force.[136] The challenged statute granted exemption from the

130. *In re* Pierce, 451 A.2d 363 (N.H. 1982).
131. N.H. REV. STAT. ANN. § 193:3 (1980).
132. Wisconsin v. White, 325 N.W.2d 76 (Wis. Ct. App. 1982).
133. Florida v. M.M., 407 So. 2d 987 (Fla. Dist. Ct. App. 1982).
134. *In re* Monnig, 638 S.W.2d 782 (Mo. Ct. App. 1982).
135. Hill v. Alabama, 410 So. 2d 431 (Ala. Ct. App. 1982).
136. Davis v. Maryland, 451 A.2d 107 (Md. 1982).

requirement to members of a "recognized church or religious denomination." The plaintiff rested his objection to immunization on personal religious views. While noting that courts in other states had viewed similar cases differently, the Maryland Supreme Court concluded that personal religious values were entitled to equal respect. The Maryland statute, however, gave an exemption only to members of specific organized churches, a provision which the court found to be an establishment of a state sanctioned religion. The court added, on the other hand, that the religious exemption portion of the statute could be severed from the rest, and held that there could be no religious exemptions at all. Therefore the plaintiff's conviction was upheld.

The Washington Supreme Court considered whether juveniles incarcerated in county detention facilities should be subjected to the state's compulsory attendance law.[137] Also at issue was the question of whether the county where such facilities were located had a responsibility to pay for the service. The seven-year-long litigation was settled quickly by the court, which concluded that the state's attendance law required the education of juveniles both before and after their adjudication. The counties were also required to pay for the education, though the court left open the question of whether a claim might be made against the state under a portion of state law allowing counties to reclaim the costs of "special supervision programs."

4.3 BILINGUAL-BICULTURAL PROGRAMS

In a 1982 case attracting wide notice, the United States Supreme Court decided by a 5-4 vote that the State of Texas had an obligation to provide a tuition-free education to thousands of "undocumented" children whose parents had illegally entered the state.[138] The Court majority affirmed a district court decision which held that illegal aliens could claim the benefit of the equal protection clause and that Texas had no rational basis for a statute which denied state funds to local district providing an education to the children.[139] In a sharp dissent, four justices concluded that the fiscal impact of the policy was a sufficient basis for the statute, absent a federal policy on the education of illegal aliens.

137. Tommy P. v. Boar[illegible]ty. Comm'rs, 645 P.2d 697 (Wash. 1982).
138. Plyler v. Doe, 102 [illegible] 2382 (1982).
139. Certain Named and [illegible]named Undocumented Alien Children v. Texas, 458 F. Supp. 569 (E.D. Tex. 1979), *aff'd on appeal* to Fifth Circuit; Doe v. Plyler, 628 F.2d 448 (5th Cir. 1980), *cert. granted*, 451 U.S. 968 (1981).

The state appellants raised a number of arguments in favor of their policy, arguing that its reversal would reward unlawful conduct and encourage others to enter the state illegally. Had Congress wished to grant formal status to the children, the appellants argued, then it would have modified federal immigration laws accordingly. Without such legislation, they concluded the state was free to establish the tuition policy. The state raised three central arguments as to why the policy was in its interest: (1) The educational services would encourage immigration and drain the state's fiscal resources, (2) the policy would improve the overall quality of education, and (3) the migrant children would be less likely than legal residents to stay in Texas after graduation.

Justice William Brennan, writing for the majority rejected each of these claims, first noting that the policy was directed not at the adults who had illegally entered the United States, but at their children.[140] While affirming the Court's previous decision that education was not a fundamental right,[141] the majority nevertheless concluded that the policy was "an affront to one of the goals of the Equal Protection Clause: The abolition of governmental barriers presenting unreasonable obstacles to advancement on the basis of individual merit."[142] The Court rejected the fiscal argument by noting that the aliens were "a cheap source of labor" who contributed more to the economy than they claimed in services. Turning to the educational arguments, the majority could find no support for the claim that the migrant children affected the overall quality of education in Texas and no justification for selecting this particular group to exclude if such evidence were forthcoming. Finally, Justice Brennan found no evidence that the children were less likely to stay in the state upon graduation and that the creation of a "subclass of illiterates" would be more costly to the state than any short term fiscal gain.

Chief Justice Warren Burger wrote for the dissenting justices, observing that it was not the Court's role to set "the Nation's social policy" and that the majority opinion abused the fourteenth amendment "in an effort to become an omnipotent and omniscient problem solver."[143] Focusing on the heart of the case, the Chief Justice concluded that Texas had a legitimate reason for distinguishing between students who were lawfully residing in the state and those who were not. Noting that the federal government excluded illegal aliens from many of its own programs, the minority concluded that the state had a rational basis for

140. Plyler, *supra*, note 138 at 2396.
141. San Antonio School Dist. v. Rodriguez, 411 U.S. 1 (1973).
142. Plyer, *supra*, note 138 at 2397.
143. *Id.* at 2408.

the policy, even though, the Chief Justice wrote: "Denying a free education to illegal alien children is not a choice I would make if I were a legislator."[144] The issue, the minority argued, was one which should be left to the political process.

Another Texas case addressed major issues surrounding bilingual programs. In a 1981 decision, a federal district judge ordered a massive statewide bilingual education program for Hispanic children residing in the state.[145] In this sweeping decree the court characterized the state's program in this area as "wholly inadequate" and ordered specific bilingual programs, testing and various monitoring activities. Texas subsequently filed procedural objections to the decision, arguing that it had not consented to the evidentiary stipulations made by its own counsel and that it had not been permitted to fully address the constitutional issues in the case.[146] The district court denied these motions and the case moved on to the Fifth Circuit Court of Appeals.[147]

On appeal, the Fifth Circuit Court found little of merit in the district court's decision, characterizing it as "severely flawed" and filled with "procedural oddities." The state defendants had originally moved for a three-judge court to hear the constitutional challenges to their bilingual programs, at which point the plaintiffs agreed to delete all constitutional claims. Later, however, the court permitted the constitutional issues to be raised when the "defendant's proposed opinion" was submitted which contained admissions of past state constitutional violations. The appeals court viewed this turn of events as follows: "Having survived all these hazards and preserved the case free of constitutional questions, defendants steamed into harbor and tied up, only to sink at the slip."[148] The blame for this unusual turn of events was assigned by the appeals court to the state's counsel, who had entered stipulations damaging to the state's case "without authority from her client and, in fact, in general disregard of its instructions to her."[149] The stipulations admitted both past discrimination and constitutional violations. At this point, the attorney assigned to the case by the state was removed from the list of attorneys licensed to practice law in Texas, for reasons unrelated to the litigation. The appeals court, then, was left with an unusual set of procedural circumstances and a case in which the state had conceded many of the major points in contention.

144. *Id.* at 2413.
145. United States v. Texas, 506 F. Supp. 405 (E.D. Tex. 1981).
146. United States v. Texas, 523 F. Supp. 703 (E.D. Tex. 1982).
147. United States v. Texas, 680 F.2d 356 (5th Cir. 1982).
148. *Id.* at 361.
149. *Id.* at 368.

In reversing, the appeals court found that the controversial stipulations lacked the factual support to sustain a claim of historical segregation or discrimination. The court also concluded that the district court should have considered Texas bilingual programs in light of a 1981 state act which addressed many of the concerns presented in the original litigation. Finally, the court required that the individual school districts whose programs were affected by the decision be given an opportunity to be heard. The court suggested that litigation be filed in several Texas district courts, rather than one, should the case be pursued.

4.4 PRIVATE AND PAROCHIAL SCHOOLS

Courts continued to rule on the permissibility of various types of state involvement with nonpublic schools in 1982. The question of transportation for private school children was before the supreme courts of three different states. In another case, a private school unsuccessfully challenged a school board's refusal to sell it surplus buildings. Maryland students failed in their attempt to be admitted to a county music program offered only to public school students. In Ohio, however, a statute providing a wide assortment of shared materials and services to private schools was upheld. Several different courts also ruled that state regulation of schools did not violate the constitutional rights of private schools.

Three state high court decisions addressed questions concerning the transportation of private school pupils. The Ohio Supreme Court held that a local school district could not end payments in lieu of transportation made to parents of private school students without conforming to all portions of the relevant state statute.[150] The local board had neglected to secure confirmation from the state board of education that the transportation was unnecessary or unreasonable, as required by the Ohio Revised Code.[151]

In Massachusetts, the supreme judicial court ruled that state law required the transportation of private school students only up to the distance of the public school which the student would otherwise attend, if the distance exceeds two miles.[152] The 1950 statute entitling private school students to transportation was upheld, but the court's interpretation of the equal distance requirement may create problems in districts where the private school is farther away than the public school. Essex, Massachusetts, where the case originated, did not

150. Hartley v. Berlin-Milan Local School Dist., 433 N.E.2d 171 (Ohio 1982).
151. OHIO REV. CODE ANN. § 3301.07(D).
152. Attorney General v. School Comm. of Essex, 439 N.E.2d 770 (Mass. 1982).

operate a high school and all pupils were bused to a nearby town. Transportation was refused to private school students, however, in spite of the state law requiring districts to provide the service to students living more than two miles from school.

In setting the new limit on private school busing, the Massachusetts court concluded that the words "to the same extent" in the state statute did not mean that the student must be bused on demand to any school. Rather, the distance to the nearest public school is an appropriate way of measuring "the same extent," the court reasoned. Further litigation on this issue can be anticipated.

The Nebraska Supreme Court upheld a state statute[153] that requires a school district providing transportation for school children to public schools also to provide transportation for children attending approved nonprofit private schools.[154] The court held that the statute did not violate the portions of the state constitution prohibiting appropriations to nonpublic schools and prohibiting the granting of special or exclusive privileges. The Nebraska court also ruled that the statute could not be challenged on equal protection grounds by the school district because it was not a member of the class that claimed to be discriminated against.

With regard to the establishment clause of the first amendment, the Nebraska court cited a United States Supreme Court case which found that a school district had not violated the first amendment when it reimbursed the parents of school children attending a nonprofit private school for money spent on bus transportation.[155] The court also held that the statute passed the three-pronged test established in *Lemon v. Kurtzman*.[156] The court concluded that the statute had the secular purpose of providing safe transportation for children attending private schools, did not inhibit or advance religion, and did not create an excessive entanglement between the state and religion.

In Delaware, a United States district court held that the Wilmington school board could refuse to sell surplus school buildings to private schools.[157] The board rejected the offer because the sale might contribute to "white flight." The private school claimed that the refusal violated its fourteenth amendment due process and equal protection rights as well as the first and ninth amendments. The district court rejected these claims, holding that the refusal did not violate the

153. NEB. REV. STAT. § 79-487 (Reissue 1976).
154. Nebraska v. School Dist. of City of Lincoln, 320 N.W.2d 472 (Neb. 1982).
155. Everson v. Board of Educ., 330 U.S. 1 (1947).
156. 403 U.S. 602 (1971).
157. Wilmington Christian School v. Board of Educ. of Red Clay Consol. School Dist., 545 F. Supp. 440 (D. Del. 1982).

Constitution because it furthered the legitimate government interest of implementing desegregation. The court agreed with the school board's contention that providing the private school with increased enrollment capacity could drain additional white students from the public school system, hampering court-ordered desegregation. The court used the rational relation standard because the refusal did not interfere with the operation of the private school nor did it deny the students' parents the right to direct their children's religious upbringing. The court held that private schools' exercise of a fundamental right was merely made more expensive. The court noted that the state was under no obligation to encourage or support private education and although it could not require public school attendance instead of private, it could encourage students to attend public schools.

A United States district court upheld an Ohio statute providing aid to elementary and secondary nonpublic school children.[158] The aid involved the provision of independent and fully severable materials and services available to students attending public schools. The court held that although the establishment clause prohibits government support or involvement with religious activity, the Supreme Court has not held that all aid to private schools is prohibited. The court examined each form of aid using the tripartite test in *Lemon v. Kurtzman*. The court noted that the provision of secular textbooks, approved for use in public schools, has been upheld in two other cases by the United States Supreme Court.[159] The court also held that the provision of maps, charts and models incapable of diversion for religious use did not differ from the textbook programs found constitutional. The court upheld certain medical, psychological, nursing, dental and optometric services, observing that the Supreme Court has repeatedly upheld the provision of public health and welfare benefits to young citizens whether they attend private or public schools. Remedial and therapeutic services for nonpublic school children provided in public centers and mobile units were also approved. The court again ruled that the programs, whose primary beneficiaries are the children in need of the services, were not likely to foster excessive entanglement between the private schools and the government. The court upheld standardized testing services and field trip transportation as well, citing Supreme Court approval of these secular activities. The court concluded that the entire statute provided nonpublic and public school children limited, secular services and materials against which it found no constitutional objections.

158. Wolman v. Essex, 544 F. Supp. 491 (S.D. Ohio 1982).
159. Board of Educ. v. Allen, 392 U.S. 236 (1968); Meek v. Pittenger, 421 U.S. 349 (1975).

Students in Maryland sought admission to an all-county music program offered to full-time public school students. The private school children contended that they were entitled to attend any program or instructional class offered to public school students. The Maryland state appeals court rejected this, holding that the school board did not have to extend all programs offered to public school students to those attending parochial schools as well.[160] The court ruled that this did not interfere with the students' free exercise of religion. The court also rejected equal protection claims and allegations that the policy burdened their right to freedom of educational choice. The court refused to open what it deemed a "Pandora's box" which would allow a private school, if it wished, to transport its entire student population to a nearby public school for a particular class. The court concluded that the legislature or school board could permit private school children to attend selected programs or classes, but that it would not mandate such a burden on the administration of the public school system.

The Supreme Court of Nebraska held that a private school does not have a first or ninth amendment right to disregard state laws regulating schools.[161] The supreme court had found previously, in a case regarding the same school, that the state's right to regulate schools was reasonable and did not place an unreasonable burden on the defendants' religious beliefs.[162] The court held that although parents had the right to send their children to private schools, they did not have the right to ignore reasonable government regulations as to the quality of education furnished. State supreme courts in Hawaii[163] and Massachusetts[164] also held that state regulations concerning the operation of schools did not unconstitutionally infringe on the rights of private schools.

4.5 SCHOOL SPORTS

4.5a State Athletic and Activity Associations

State athletic associations continued to have their rules and regulations upheld in 1982 as courts generally concluded that the rules had a rational relationship to legitimate state interests. Students unsuccessfully challenged antitransfer rules, age restrictions, residency

160. Thomas v. Allegany Cty. Bd. of Educ., 443 A.2d 622 (Md. 1982).
161. Sileven v. Tesch, 326 N.W.2d 850 (Neb. 1982).
162. Nebraska v. Faith Baptist Church, 301 N.W.2d 571 (Neb. 1981), *cert. denied*, Faith Baptist Church v. Douglas, 454 U.S. 803 (1981).
163. Hawaii v. Andrews, 651 P.2d 472 (Hawaii 1982).
164. Attorney General v. Bailey, 436 N.E.2d 139 (Mass. 1982).

requirements, and a rule prohibiting Orthodox Jews from wearing yarmulkes while playing basketball. In one case, a court also held that a referee's decision should not be the subject of litigation. Another decision did find, however, that an athletic association violated a student's procedural due process right when it withheld a semester of athletic eligibility without offering any basis for the decision.

A federal district court in Illinois saw its decision allowing Orthodox Jews to wear yarmulkes while playing basketball overturned by the Seventh Circuit Court of Appeals.[165] Members of the Orthodox Jewish faith are required to keep their heads covered at all times unless they are unconscious, immersed in water, or in imminent danger of loss of life. The Illinois High School Association (IHSA) has a rule prohibiting the wearing of casts, bobby pins, jewelry or headgear while playing basketball. Students at a private secondary school adhering to the Orthodox faith challenged this rule. The district court had held that the IHSA rule constituted state action for constitutional purposes and that the group would have to show a compelling state interest to outweigh the students' first amendment religious rights.[166] The court concluded that although yarmulkes do fall to the floor once or twice a game, so do eyeglasses worn by the participants, part of pompoms, and other debris against which there are no prohibitions. The court held, therefore, that the prohibition against yarmulkes did not serve a compelling state interest and that the underlying safety concerns were too slight to outweigh the students' first amendment rights.

The Seventh Circuit Court of Appeals reversed, ruling that the precise method of covering the head is not specified by Jewish law, and that the wearing of the yarmulke, which is likely to fall off during a basketball game, was by convention rather than religious obligation. The court found the safety concerns of the state "while not great, were not wholly trivial"[167] and interpreted the IHSA's rule as only prohibiting insecurely mounted yarmulkes. The court put on the plaintiffs the burden of devising an alternate method of covering the head which satisfied the safety concerns of the IHSA. The students then petitioned for a rehearing, but it was denied by the court.

In a Missouri case, the transfer rule of the state high school athletic association was upheld in the Eighth Circuit Court of Appeals.[168] The court consolidated a number of actions including a case reported last

165. Menora v. Illinois High School Ass'n, 683 F.2d 1030 (7th Cir. 1982).
166. Menora v. Illinois High School Ass'n, 527 F. Supp. 637 (N.D. Ill. 1981).
167. Menora, *supra*, note 165 at 1035.
168. *In re* United States *ex rel.* Missouri State High School Activities Ass'n, 682 F.2d 147 (8th Cir. 1982).

year[169] and an appeal of a district court ruling which found that the transfer rule violated the equal protection clause of the fourteenth amendment of the Constitution.[170] The rule, one common to most states, prohibits transfer students from participating in interscholastic athletics during the first year after their transfer. The district court held that the rule was capricious and overinclusive because it involved students who transferred schools for legitimate purposes. The appeals court disagreed, holding that "the rule need only be rationally related to a legitimate state purpose,"[171] concluding that the prevention of transfers motivated by athletics was legitimate and that the wisdom or unfairness of the rule was a policy decision for legislators and administrators. The appeals court also rejected due process claims and said that for private schools the transfer rule was still a "reasonable and neutral regulation."[172]

Two cases involving the New Hampshire Interscholastic Athletic Association (NHIAA) were heard last year. In the first, the NHIAA appealed an order allowing a student to run in a track meet called the "Meet of Champions."[173] The student claimed that he had been fouled during a qualifying meet, causing him to finish seventh and miss the cutoff for the "Meet of Champions." Although he protested the foul after the race, there was no referee located near the alleged infraction for verification. The meet director wrote a letter to the NHIAA requesting that the student be allowed to run in the "Meet the Champions" because of the controversy over the foul. The NHIAA refused to allow him to participate, and a trial court subsequently ordered them to allow him to run. The state supreme court, on the day of the race, held that every referee's decision could not be subjected to judicial scrutiny. Finding no irregularities with the NHIAA's procedures, the court vacated the lower court order.

The second New Hampshire case involved a student who withdrew from his sophomore year of high school because of illness and was subsequently granted only one extra semester of athletic eligibility by the NHIAA.[174] The student had gone through the proper appeals process

169. Barnhorst v. Missouri State High School Activities Ass'n, 504 F. Supp. 499 (W.D. Mo. 1980).
170. ABC League v. Missouri State High School Activities Ass'n, 530 F. Supp. 1033 (E.D. Mo. 1981).
171. *In re* United States *ex rel.* Missouri State High School Activities Ass'n, 682 F.2d 147 (8th Cir. 1982) at 152.
172. *Id.* at 153.
173. Snow v. New Hampshire Interscholastic Athletic Ass'n, Inc., 449 A.2d 1223 (N.H. 1982).
174. Duffley v. New Hampshire Interscholastic Athletic Ass'n, Inc., 446 A.2d 462 (N.H. 1982).

but received neither an appeals hearing nor a reason why he wasn't granted a full year of eligibility. The NHIAA merely stated its denial of a full year of eligibility in the minutes of its executive council. The state supreme court held that the right to participate in interscholastic athletics was protected by the procedural due process clause of the state constitution. Due process was required to assure that the facts were relied upon in making the eligibility determination and that the decision was reasonable. The court concluded that the NHIAA "found no facts and gave no reasons for its decision denying the plaintiff eligibility"[177] and thereby violated his procedural due process right.

The Supreme Court of Oklahoma held that an athletic association rule prohibiting nineteen-year-old students from participating in interscholastic high school athletics was reasonable, fair, and related to the purpose it was intended to serve.[176] The court overturned a district court ruling allowing the student to compete in interscholastic track events. The court found no evidence of fraud, or collusion, or that the association had acted in a capricious, unreasonable, or arbitrary manner.

A high school student challenged the Ohio High School Athletic Association rule prohibiting nonstate residents from participating in interscholastic athletics. A state appeals court held that a trial court had been correct in applying the rational basis test in evaluating the alleged equal protection violation.[177] The court ruled that high school athletes were definitely not a suspect class entitled to strict scrutiny. The court concluded that participation in athletics was not a separate property interest entitled to due process and that there was nothing arbitrary or collusive about the rule.

A Florida court held that a high school activities association rule limiting the number of team members permitted to participate in postseason football play violated the equal protection clause of the Constitution.[178] During the regular season, teams were permitted to suit up an unlimited number of players, but during the playoffs teams were allowed only forty-four. The court held that the rule created two classes of football players: those who practice every day and are allowed to play in all games and those who practice every day and are allowed to play only in regular season games. The court said the rule was "shocking and reprehensible"[179] and ordered that all students on the roster of the football team be allowed to participate in playoff competition.

175. *Id.* at 468.
176. Mahan v. Agee, 652 P.2d 765 (Okla. 1982).
177. Menke v. Ohio High School Athletic Ass'n, 441 N.E.2d 620 (Ohio Ct. App. 1981).
178. Florida High School Activities Ass'n v. Thomas, 409 So. 2d 245 (Fla. Dist. Ct. App. 1982).
179. *Id.* at 248.

The University Interscholastic League of Texas appealed a ruling enjoining them from enforcing an eligibility rule in which schools were ordered to forfeit all games in which ineligible players had participated.[180] A state appeals court held that the league was not a governmental agency and would therefore have to post a bond in order to appeal. In another Texas case, a different appeals court also ruled that an athletic association would have to provide security in order to appeal a ruling which enjoined them from enforcing their summer camp rule.[181]

4.5b Sex Discrimination

Only two cases involved allegations of sex discrimination in 1982. In one, a federal district court held that female students did not have the right to participate on a boys' basketball team under either the equal protection clause or Title IX. In the second, a state supreme court found that separate seasons for boys and girls in the same sport were permissible.

In a case that was reviewed by Supreme Court Justice Paul Stevens,[182] a district court ruled on the motion for a summary judgment made by a school board which refused to allow an eleven-year-old girl to try out for the boys' basketball team.[183] The female student is an exceptional basketball player and wished to play on the boys' team in order to find competition sufficient to develop her skills. The district court originally had issued a preliminary injunction allowing her to try out for the boys' team, but an appeals court reversed and Justice Stevens refused to intercede.

The district court subsequently found that the student had not been denied equal protection. The district court concluded that gender-based discrimination must be substantially related to an important government objective in order to be constitutional. The court then found that separate teams were needed for boys and girls in order to maximize participation of both sexes and to prevent boys from dominating the girls' program which would deny them an equal opportunity to compete in sports. The court noted that although the policy was arbitrary with regard to this particular student, it was reasonable in substantially all of its applications and therefore was not an unconstitutional generalization. On the student's claim that her exclusion

180. University Interscholastic League v. Payne, 635 S.W.2d 754 (Tex. Civ. App. 1982).
181. Marshall v. Brown, 635 S.W.2d 578 (Tex. Civ. App. 1982).
182. O'Connor v. Board of Educ. of School Dist. No. 23, 645 F.2d 578 (7th Cir. 1981), *cert. denied*, 454 U.S. 1084 (1981).
183. O'Connor v. Board of Educ. of School Dist. No. 23, 545 F. Supp. 376 (N.D. Ill. 1982).

from the boys' team violated Title IX, the court held that the federal regulation merely required that when selecting which teams and sports to offer, the interests and abilites of both sexes are to be taken into account so that each sex has an equal opportunity to participate. The court concluded that this was not intended to require that girls be allowed to participate on boys' teams. The motion for a summary judgment was granted and the plaintiff's action was dismissed.

The Supreme Court of Minnesota held that separate seasons for boys' and girls' athletic teams in the same sport did not deny them equal protection of the law.[184] The seasons were substantially equal in terms of length, rules, coaching and money spent. They had been separated because limited facilities were available. The court also held that the costs of the transcript used to prepare a post-trial brief by the prevailing party could not be charged to the losing party and that the costs of the transcript used in making a motion for a new trial could not be taxed to the other party.

4.6 SUBSTANTIVE RIGHTS OF STUDENTS

4.6a Search and Seizure

Courts continued to grapple with fourth amendment issues in a number of 1982 cases. Because the fourth amendment prohibition against unreasonable search and seizure applies only to official actions by government agents, cases in this area often hinge on the role of school personnel in conducting searches and on the subsequent use of evidence seized. Searches conducted by police officrs have traditionally been subjected to a "probable cause" standard and any failure to obtain a search warrant must be justified. School officials generally must meet the less rigorous standard of "reasonable suspicion," particularly if the evidence is subsequently used only in school disciplinary action as distinct from criminal prosecution. These issues were debated in several 1982 cases, as was the increased use of sniff dogs to recover contraband in the public schools. The use of sniff dogs has been the subject of varying rulings in different courts and was litigated again last year in a federal court of appeals.

In response to a growing drug and alcohol problem, the Goose Creek Independent School District in Texas hired a service providing dogs trained to recognize sixty different illicit substances. The dogs were taken to schools within the district on a random basis where they sniffed students, lockers and cars. Students and lockers subsequently

184. Striebel v. Minnesota State High School League, 321 N.W. 400 (Minn. 1982).

were searched if the dog indicated that it recognized an illicit substance. In the case of a car, the owner was asked to open its doors and trunk. Plaintiffs challenged the searches on the basis that they violated their fourth and fourteenth amendment rights. A district court found in favor of the school district and this was appealed to the Fifth Circuit Court of Appeals.[185] The appeals court struck down the use of dogs to sniff students but upheld their use for sniffing cars and lockers. The school district then petitioned for a rehearing. The court granted this and withdrew its first opinion.[186] In their second opinion, the Fifth Circuit reviewed the conflicting case law on the subject. The Tenth Circuit has upheld the use of dogs to sniff lockers in a case focusing on the fourteenth amendment,[187] and the Seventh Circuit has upheld the use of dogs to sniff students, relying on the doctrine of in loco parentis.[188] On the other hand, a district court in the Fifth Circuit last year rejected the use of dogs to sniff students or automobiles.[189]

The Fifth Circuit Court of Appeals ruling held that student lockers and cars wre in public areas and thus subject to an expectation of much less privacy, analogous to luggage checked at an airport.[190] Using *United States v. Goldstein*,[191] the court ruled that the sniffing of unattended lockers and cars in a public area did not constitute a search, and therefore the fourth amendment did not apply. Turning to the question of the sniffing of students, the court said that the search of a student was an entirely different question, concluding, "The students' persons certainly are not the subject of lowered expectations of privacy."[192] The court held that the degree of personal intrusiveness involved in the canine sniffing of a student made it a search, subject to the restrictions of the fourth amendment. The court felt that searches involving classrooms where there was no individualized suspicion were not reasonable and could not be justified by the need to prevent drug and alcohol abuse. The use of dogs to sniff student without reasonable individual suspicion was declared unconstitutional. The court also ruled that the presence of the dogs on campus did not violate the students' fourteenth amendment due process rights and that the case should be certified as a class action suit. On the question of the reliability of the

185. Horton v. Goose Creek Indep. School Dist., 667 F.2d 471 (5th Cir. 1982).
186. Horton v. Goose Creek Indep. School Dist., 690 F.2d 470 (5th Cir. 1982).
187. Zamora v. Pomeroy, 639 F.2d 662 (10th Cir. 1981).
188. Doe v. Renfrow, 475 F. Supp. 1012 (N.D. Ind. 1979), 631 F.2d 91 (7th Cir. 1980), *cert. denied*, 451 U.S. 1022.
189. Jones v. Latexo Indep. School Dist., 499 F. Supp. 223 (E.D. Tex. 1980).
190. Horton, *supra*, note 186.
191. 452 U.S. 962 (1981).
192. Horton, *supra*, note 186.

dogs, the court said there was not enough information in the record for a determination and remanded the question to the district court approving the use of the standard that the dogs merely had to be shown to be reasonably reliable.

An Alaska appeals court upheld the search of a high school student who had stolen money out of a locker room during a gym class.[193] The court rejected the use of in loco parentis, reasoning that search was not by private parties but "under the color of law"[194] because school officials had acted under school board policies and has used their status as public school officials in claiming the right to search the student. Although this meant there was sufficient state action to warrant application of the fourth and fourteenth amendments, the court held that school officials were not actual police officers whose regular duty is law enforcement and thus were subject to less stringent constitutional limitations.

A state appeals court in California upheld a search made by a school security agent on school grounds.[195] The court ruled that the security agent was "properly acting within the scope of his employment"[196] when he conducted a pat-down search of a student with unusually large bulges in his pockets. Cases which would classify the security agent as a police officer, bringing him under the constraints of the fourth and fourteenth amendments, were ruled inapplicable.

In Kentucky, a girl was suspended for failing to allow school officials to search her purse for firecrackers. Small, legal firecrackers had caused disruptions, and the student had been implicated as the source of the firecrackers. The district court ruled that reasonableness was the criterion to use under the circumstances.[197] The judge held that there is a need for discipline in schools and that teachers should not have to seek a warrant for every petty disciplinary action. Although not accepting the doctrine of in loco parentis as justification for every search, the court found there had not been a clear violation of the federal Constitution.

In Michigan, a federal district court ruled that a two-way mirror in a bathroom did not violate a student's fourth amendment right to privacy.[198] A tenth grade student was observed through the mirror buying marijuana from another student. He subsequently was taken to the principal's office, suspended and reported to the police. The court held

193. D.R.C. v. Alaska, 646 P.2d 252 (Alas. Ct. App. 1982).
194. *Id.* at 155.
195. *In re* Guillermo M., 181 Cal. Rptr. 856 (Cal. Ct. App. 1982).
196. *Id.* at 857.
197. Bahr v. Jenkins, 539 F. Supp. 483 (E.D. Ky. 1982).
198. Stern v. New Haven Commun. Schools, 529 F. Supp. 31 (E.D. Mich. 1981).

that students enjoy a lower expectation of fourth amendment rights in schools and noted other cases in which searches of students have been upheld. The court quoted a Tenth Circuit Court of Appeals case which held that a student's fourth amendment rights must yield if they interfere with a school's duty to educate and maintain discipline.[199] The court also observed that the surveillance was done by school officials and not police officials and that only school disciplinary action resulted.

A New York court ruled that school officials have broad powers to maintain discipline and provide security in public schools.[200] A principal was found to be upholding his in loco parentis responsibilities when he detained five youths who were not students of the school and who were suspected of harassing its students. In another case, a Florida appeals court ruled that a student who merely looked suspicious could be detained in the principal's office for the purpose of a search.[201]

4.6b First Amendment Religious Rights

Courts continue to consider attempts by school boards or legislatures to establish "moments of silence" or other substitutes for prayer in public school classrooms. Four such cases were recorded in 1982. In addition, first amendment religious violations were alleged in cases involving shared time of private school facilities, attempts to require the teaching of "creation science," and a state-required sex education curriculum. In weighing whether or not a public school program or practice violates the first amendment prohibition against an establishment of religion, courts employ the three-part analysis contained in *Lemon v. Kurtzman*.[202] For a practice or policy to be upheld, an affirmative answer must be given to three questions: Does the policy or practice have a secular purpose? Is the primary effect of the policy or practice one which neither advances nor inhibits religion? Does the policy or practice avoid an excessive entanglement with religion?

The three-part test was used by the Fifth Circuit Court of Appeals to consider the constitutionality of a Lubbock, Texas school district policy that permitted students to meet voluntarily for prayer purposes before and after school.[203] The original suit was filed in 1979 at a time when the district permitted morning Bible readings over school public

199. Zamora v. Pomeroy, 639 F.2d 662 (10th Cir. 1981).
200. Smalls v. Board of Educ. of City of New York, 450 N.Y.S.2d 987 (N.Y. Civ. Ct. 1982).
201. W.J.S. v. Florida, 409 So. 2d 1209 (Fla. Dist. Ct. App. 1982).
202. 403 U.S. 602 (1971) at 612-13.
203. Lubbock Civil Liberties Union v. Lubbock Indep. School Dist., 669 F.2d 1038 (5th Cir. 1982).

address systems, silent prayers in classrooms and the distribution of Bibles to fifth and sixth grade students. By the time the case was heard by the Fifth Circuit, only the voluntary prayer issue and attorney fees were left to be decided; the district had ceased the other practices. In looking at the first of the three parts of the test, secular purpose, the appeals court weighed and rejected the district's claim that the prayer meetings could be justified because they taught students "leadership and communication skills." The court concluded that there were other programs in the schools to accomplish this purpose.

The court next turned to the primary effect test, concluding that the policy actually advanced organized religion. The fact that the meetings were voluntary was discounted by the court, which cited the well-established principle clearly articulated by the United States Supreme Court in *Engle v. Vitale*[204] that voluntary participation in public school observances does not free the activity from the limitations of the establishment clause. The court also found the prayers violated the establishment test, noting that public facilities and teacher supervision were both provided. Having violated all three parts of the test, an injunction was entered against the prayer sessions. Attorney fees and costs were assessed against the school district.

A Tennessee statute requiring one minute of silence "for meditation or prayer or personal beliefs" at the start of the first class each day in all state public schools was the subject of a federal court challenge.[205] The state sought to demonstrate that the moment of silence had a secular purpose and the district court turned to the history of the act to discover its purpose. After reviewing the arguments made by the legislation sponsors, the court quickly concluded that the legislature was seeking to promote prayer in the public schools, rather than to achieve some secular purpose. Further, the primary effect was the advancement of religion. Because the act failed the first two parts of the *Lemon v. Kurtzman* test, the court made cursory reference to the third and declared the act to be unconstitutional.

Voluntary prayer or meditation fared no better in Massachusetts. The state supreme judicial court was asked by the state house of representatives to offer an advisory opinion on the constitutionality of a proposed act that would allow teachers to start the day with a minute of prayer or meditation.[206] Allowing such prayers would, the court concluded in a brief opinion, clearly violate the establishment clause because there clearly was no secular purpose, but rather an advancement of religion. Two dissenting justices would have permitted the

204. 370 U.S. 421 (1962).
205. Beck v. McElrath, 548 F. Supp. 1161 (M.D. Tenn. 1982).
206. *In re* Justices to the House, 440 N.E.2d 1159 (Mass. 1982).

prayers, citing as authority a Massachusetts high court case that permitted the legislature itself to start its session with a prayer.

In an opinion making a number of interesting comments, an Alabama district court reluctantly issued a preliminary injunction staying the enforcement of a state statute requiring teachers to lead "willing students" in a prayer that had been written by the Governor's son.[207] the court concluded that there was a substantial likelihood that the plaintiffs would prevail in their argument that the prayer statute violated the establishment clause. The court went on to add that the involvement of courts in school operations meant that courts would have to become involved in "a whole host of areas, such as censoring, that we have heretofore ignored or overlooked."[208] As an example, the court stated, a story with the word "Goddamn" in it might be seen as the advancement of such "religions" as humanism, secularism or agnosticism. The court expressed its personal preference that "a student or teacher should be able to pray at school whenever it would be permissible for him to speak."[209] While stopping the mandatory prayer, the court let stand an Alabama state code requirement that each school day should start with a minute of silence for meditation or voluntary prayer. The court's decision on the rule was made without reference to other cases that have reached opposite conclusions about such practices.

A complicated system of "shared time" and "community education" programs taking place in Grand Rapids, Michigan, private schools was the subject of litigation.[210] The courses and programs were offered by public school employees in the private school classrooms. While technically open to all students, the courses were, in fact, taken only by students enrolled in the private institutions. While most of the courses were electives, some required physical education courses were provided to the private and parochial students by the public school teachers. Whenever teaching such courses, the teachers would post a sign on the classroom wall which read "Public School Classroom." In addition to the salaries, the public schools contributed rent for the classroom space to the private institutions. Testimony in the case revealed that the arrangement had been widely advertised by the school board in its successful attempts to persuade district voters to approve school borrowing referenda.

In applying the *Lemon* tests to this arrangement, the court concluded that the entire class of persons which benefitted from the programs

207. Jaffree v. James 544 F. Supp. 727 (S.D. Ala. 1982).
208. *Id.* at 732.
209. *Id.* at 733.
210. Americans United for Separation of Church and State v. School Dist. of Grand Rapids, 546 F. Supp. 1071 (W.D. Mich. 1982).

were enrolled in the religious schools. Likewise most of the teachers paid by the public schools were also private school teachers. Thus the programs was neither secular nor neutral in its effect on religion. Finally, the court concluded the plan resulted in the total mixing of government and religion, citing the school board's referendum campaign. While remarking on the "sincerity, intelligence and dedication" of Grand Rapids' educators, the court nevertheless issued a permanent injunction against the programs.

An attempt by proponents of "creation science" to require that the perspective be taught with equal prominence to evolution theories was rebuffed in Arkansas.[211] Plaintiffs in the well-publicized case argued that the Arkansas statute violated both the establishment clause and the free speech clause of the first amendment as well as the due process clause of the fourteenth amendment. The district court's carefully worded opinion, however, decided the case on first amendment religious grounds and did not reach the other arguments. Noting that courts had an obligation to attach deference to legislative statements in establishment clause cases, the district court turned to the origins of the Arkansas statute. Looking at the correspondence by the bill's author, the court found "a religious crusade, coupled with a desire to conceal the fact."[212] By attempting to introduce the Biblical version of creation into the schools, the act was seeking to advance religion, thus failing the first part of the *Lemon* test. After observing that "a theory that is by its own terms dogmatic, absolutist and never subject to revision is not a scientific theory,"[213] the court found that creation science had neither scientific nor educational value and therefore had only the effect of advancing religion, thereby failing the second part of the test. The classroom monitoring required to assure compliance satisfied the court that there also was excessive governmental entanglement. Thus the court issued an injunction against the act, concluding; "No group, no matter how large or small, may use the organs of government, to foist its religious beliefs on others."[214]

Finally, New Jersey parents challenged a regulation of the state board of education that each local district have a family life education program in public elementary and secondary schools.[215] The New Jersey Supreme Court certified the case directly, before it could be heard by an intermediate court.[216] The rule requires each New Jersey

211. McLean v. Arkansas Bd. of Educ., 529 F. Supp. 1255 (E.D. Ark. 1982).
212. *Id.* at 1261.
213. *Id.* at 1269.
214. *Id.* at 1274.
215. Smith v. Ricci, 446 A.2d 501 (N.J. 1982).
216. Smith v. Ricci, 446 A.2d 691 (N.J. Memo Dec. 1981).

public school student to receive instruction in all aspects of the family life program, including sex education, unless a parent or guardian finds a part of the program objectionable. The student is then excused from that portion. Parents filing the suit claimed the program violated their first amendment rights because students would be exposed to attitudes, goals and values contrary to their own and to those of their parents, and would "thereby be inhibited in their practice of religion."[217]

The New Jersey high court first looked at the alleged violation of the free exercise clause. Focusing on the right of students not to participate, the court concluded that there could be no violation of the clause where participation was voluntary, even if it was sometimes difficult for a student to leave the classroom while the objectionable material was being taught. To eliminate all school curriculum that might offend some group, the court reasoned, would make that group's beliefs state policy, thereby violating the establishment clause.

The court also addressed the appellant's claim that the program established secularism as a religion, thereby violating the establishment clause. Finding no merit in this argument, the court concluded that the program was indeed secular and was neutral in its effect on religion, neither advancing nor prohibiting the discussion of religion in the classroom. This, the court reasoned, was what *Lemon* had envisioned should be the treatment of subjects that had a moral or spiritual component. Thus the program was upheld by the unanimous court, which also rejected assorted procedural claims about the rules' adoption that were raised by the appellants. In rejecting the secularism-as-religion arguments, the New Jersey court followed in the steps of other state courts which have considered and rejected similar arguments in recent years.

4.6c First Amendment Freedom of Expression

Litigation challenging the removal of school library books by the Island Trees, New York, school board was heard by the United States Supreme Court.[218] Six separate opinions were filed by the justices, thereby contributing to the uncertain state of the law in this controversial area. Justice Brennan was joined by Justices Marshall and Stevens in the Court's plurality opinion, Justice Blackmun concurred in the judgment while disagreeing with the central argument made by Brennan. Justice White voted to sustain the outcome, but reserved judgment

217. Smith, *supra*, note 215 at 505.

218. Board of Educ., Island Trees Union Free School Dist. v. Pico, 102 S. Ct. 2799 (1982).

on all of the outstanding issues in the case. Thus a bare majority of five justices agreed only that a Second Circuit Court of Appeals decision remanding the case to the district court for trial should be upheld.[219] Those looking for guidance from the Supreme Court on whether or not school boards have the power to remove controversial books from school libraries thus will have to wait longer for an answer. Four separate dissents were also filed in the case.

The issue began in 1975 when the school board, in response to pressure from a politically conservative parents' group, removed nine books from the Island Trees school libraries. The books included works by Kurt Vonnegut, Oliver LaFarge, Eldridge Cleaver and Bernard Malamud. No school official had read the works and the board did not follow its own library policies in taking the action. A "Book Review Committee" appointed by the board later recommended that some of the books be restored, but the board rejected the committee's suggestions. Suit was then filed in district court, claiming that the removal violated the first amendment rights of students. The court issued a summary judgment, holding that "while removal of such books from a school library may ... reflect a misguided educational philosophy, it does not constitute a sharp and direct infringement of any first amendment right."[220] The Second Circuit court reversed this decision and, in a precursor of things to come, each of the three judges on the appeals panel wrote a separate opinion. The Second Circuit majority did conclude that the petitioners should have had an opportunity to argue the first amendment issues and that the board should reply by defending their intervention into school library decision making. It was the decision ordering the rehearing which was upheld by the Supreme Court.

In his opinion, Justice Brennan articulated a number of conclusions about the case at hand, none of which attracted support from a majority of the Court. He observed that the case involved library books which were not part of required reading lists and that book removal, not acquisition, was at issue. He suggested that separate standards should apply when these factors were present. He observed that school boards did not have absolute discretion to remove library books simply because they did not like the ideas contained in them, but that genuine issues of fact remained unresolved as to whether or not a constitutional violation was present in the removal, thus necessitating the need for a rehearing. On the way to reaching this conclusion, Justice Brennan argued that

219. Pico v. Board of Educ., Island Trees Union Free School Dist., 638 F.2d 404 (2d Cir. 1980).

220. Pico v. Board of Educ., Island Trees Union Free School Dist., 474 F. Supp. 387, 397 (E.D.N.Y. 1979).

"the right to receive ideas" was a necessary predicate to the recipients' own ability to exercise first amendment rights.[221] Thus the right to receive ideas or information was protected by the amendment.

It was this extension of the first amendment to which Justice Blackmun objected in his concurring opinion. In espousing a more traditional view of first amendment balancing, he noted the issue was one in which the Court "must reconcile the schools' 'inculcative' function with the first amendment's bar on 'prescriptions of orthodoxy.'"[222] But "with a record as sparse as the one before us," Blackmun was unable to decide whether the school board had exceeded its authority and he voted for the remand. Justice White concurred, complaining about the unnecessary "dissertation" on the first amendment contained in the plurality opinion. He concluded, "We should not decide constitutional questions until it is necessary to do so. . . ."[223] White was the only justice to avoid the first amendment issues.

The four remaining justices joined Chief Justice Burger in his dissent, though each also wrote separately. The Chief Justice argued that the plurality opinion transformed "optional" reading into a "right" and took exception with the distinctions in the Court's opinion between removing and acquiring books and between decisions involving classrooms and those concerned with libraries. "No amount of 'limiting' language could rein in the sweeping 'right' the plurality would create," the Chief Justice argued.[224] Justice Powell, in still sharper language, took issue with the right-to-receive-ideas concept, claiming that the failure to remove nine "vulgar or racist books" symbolized a "debilitating encroachment upon the institutions of a free people."[225] He attached an appendix to his dissent with excerpts from the nine books that he found offensive. Justice Rehnquist found the plurality opinion "largely hypothetical" and argued that the district court was correct in its summary judgment. In her two-paragraph dissent, Justice O'Connor supported the power of school boards to make decisions about books, while not personally agreeing with the board's action with respect to some of the books in the case at hand.

The fractured nature of the Supreme Court's decision, with Justice White not confronting the constitutional issues at all, guarantees further litigation on the question of the first amendment and school libraries. Whether they are, as Justice Brennan characterized, institutions separate from the rest of the school, where access to ideas has

221. Pico, *supra*, note 218 at 2808.
222. *Id.* at 2814.
223. *Id.* at 2817.
224. *Id.* at 2821.
225. *Id.* at 2823.

additional constitutional protection, or whether they are totally under a school board's control, as argued by the dissenting justices, remains to be decided. Equally unclear are questions regarding the importance of following procedures for book removal, and the question of whether a simple assertion that a work is vulgar or obscene can withstand counterclaims that a book is being removed for political reasons.

In a case with frequent reference to *Pico*, a Maine district court ordered a banned book restored to a school library.[226] The book, *365 Days*, is a series of nonfictional accounts of the Vietnam War by American combat soldiers. It reposed peacefully in the Baileyville High School library from 1971 to 1981 when a parent asked that it be removed because it contained objectionable language, a four-letter word. While neither the parents, the superintendent, nor the board had read the book, the board ordered it removed. The board ban also prohibited any student from carrying the book on school property, including school buses. Finding a "rudimentary" right to receive information and ideas, the court concluded that the school committee had failed to determine whether harm would befall all students who read the work. The court also noted that the board had no procedures at all for cases such as this and concluded that the ban was unconstitutionally overbroad. An interim injunction ordered the book returned to the school library.

A film version of "The Lottery," a short story by Shirley Jackson in which the citizens of a small town randomly select one person to be stoned to death each year, was shown to American literature students in Forest Lake, Minnesota. A parents' group claimed the film had an impact on students' religious and family values. The school board, after hearings, and against the recommendation of an advisory committee, voted to remove the film from the curriculum. A district court ruled that the board's objections had "religious overtones" and that the film and an accompanying educational "trailer" had been banned because of their "ideological content." This decision was then appealed to the Eighth Circuit Court of Appeals.[227]

Citing *Pico* and its imputed right for students to receive information, the appeals court concluded that the film had been withdrawn simply because the board objected to the ideas in the material. Because the board had refused to justify the removal, the court determined that the decision had a "chilling effect" on the free speech of students and teachers. Placing the burden on the board to explain its decision, the court decided that there had been no government interest expressed

226. Sheck v. Baileyville School Comm., 530 F. Supp. 679 (D. Me. 1982).
227. Pratt v. Independent School Dist. No. 831, Forest Lake, 670 F.2d 771 (8th Cir. 1982).

that would justify the interference with the students' right to receive information. Thus, while the court found the film was not "comforting," there was no justification for its removal solely because a majority of the board had found some parts of it offensive.

The musical "Pippin," which was to have been performed by Dover, Delaware, high school students, was cancelled by the superintendent when he determined that the play contained sexually explicit scenes. The director and an assistant principal had revised some of the scenes to make them, in their judgment, appropriate for a high school audience. Parents filed suit following the superintendent's decision but a district court concluded that the students' first amendment right of expression had not been abridged.[228] Appeal was taken to the Third Circuit Court of Appeals.[229] The key to the appeals court analysis was the fact that the play was an integral part of the school curriculum. As such, the court expressed reluctance to interfere with the decision of a school administrator. Noting that an unedited version of the play remained in the school library, the court concluded that there had been no limit on the access to ideas within the school.

Students urging a school boycott distributed a leaflet in the Brazil, Indiana, senior high school and were immediately suspended and subsequently expelled for the remainder of the school year, following a formal hearing. The leaflet protested new discipline rules in force at the high school and was distributed less than twenty-four hours after a previous walkout in which fifty-four students had participated. The students were expelled under a section of their school code that permitted the penalty for "interfering with school purposes or with the orderly operation of the school." The students subsequently filed suit claiming that the leaflet distribution was protected by the first amendment.[230] In weighing their claim, the court turned to *Tinker v. Des Moines Independent School District*,[231] The grandfather of all school first amendment cases. In *Tinker*, the right of students to wear black armbands to protest the Vietnam War was upheld, and expression in schools was affirmed so long as the expression did not "materially and substantially" interfere with the operation of the school. While nothing had happened as the result of the leaflet in question, the court concluded that the previous day's walkout was evidence of a threat to the school sufficient to justify the suspension and subsequent expulsion of the students.

228. Seyfried v. Walton, 512 F. Supp. 535 (D. Del. 1981).
229. Seyfried v. Walton, 668 F.2d 214 (3d Cir. 1981).
230. Dodd v. Rambis, 535 F. Supp. 23 (S.D. Ind. 1981).
231. 393 U.S. 503 (1969).

4.7 SANCTIONS FOR STUDENT MISCONDUCT

4.7a Suspensions and Expulsions

Cases in this area usually challenge the adequacy of hearings provided before a student is suspended or expelled from school. The United States Supreme Court in *Goss v. Lopez*,[232] held that students had both a property and a liberty interest in a public school education and that even a short term suspension of ten days or less had to be preceded by a minimal due process hearing. Such a hearing must afford the student an opportunity to learn why the suspension is occurring and an opportunity to contest the facts of the case. Suspensions in excess of ten days may require more due process and expulsion cases require full procedural protection.[233] Whether or not a student has had an appropriate hearing is often contested. Courts in recent years have been reluctant to expand the *Goss* hearing requirements and have generally found in favor of school district exclusion policies.

In 1982, the United States Supreme Court heard its first suspension case in five years, affirming the suspension of a tenth grade student who had been consuming alcohol in school.[234] The case has little precedential value and was heard in the fact of a dissent by three justices that the case was "not of the sufficient importance to warrant full briefing and argument."[235] There was no dispute concerning whether or not the student had consumed the alcoholic beverage which led to the student's suspension and subsequent expulsion by the school board for the remainder of the school year. Instead, the district court, with the Eighth Circuit Court of Appeals affirming,[236] ordered the student reinstated because he had been suspended under the school district's rule which prohibits drug consumption, rather than the section banning alcohol consumption. The Supreme Court reversed, holding that the lower courts "plainly erred" by using "their own notions" as to the distinction between alcohol and drugs. The Court concluded that the school board's decision as to which rule was appropriate should be allowed to stand.

A Maine student who admitted using marijuana on school grounds was suspended and subsequently expelled. The student and his parents challenged the decisions, raising a variety of procedural arguments

232. 419 U.S. 565 (1975).
233. Wood v. Strickland, 420 U.S. 308 (1975).
234. Board of Educ. of Rogers v. McCluskey, 102 S. Ct. 3469 (1982).
235. *Id.* at 3472.
236. McCluskey v. Board of Educ. of Rogers, 662 F.2d 1263 (8th Cir. 1981).

seeking to expand the *Goss* requirements.[237] First, citing *Miranda v. Arizona*,[238] the student argued that his initial questioning about the matter should have been preceded by a warning that he had the right to remain silent and that he had the right to have his parents present before questioning. Next, the student claimed a right to leave the principal's office during questioning. The student also argued that his participation in a drug abuse program required the school board to reduce the expulsion penalty and that the student's "school probation" following his return from the expulsion deprived him of a property interest. The district court rejected all of these novel claims, refusing to expand the *Goss* suspension hearing requirements or to find an error in the district's expulsion procedure. The court decided that there was no precedent or constitutional justification for any of the arguments.

Expulsion from school is such a serious penalty that courts look closely at the procedure used, generally requiring full due process and overturning school board decisions if the process was seriously flawed. In one such case, the California Supreme Court reversed an expulsion when witnesses to the incident did not testify.[239] The plaintiff had been expelled for participating in an unprovoked assault on two students following a football game. The assault was alleged to have been racially motivated. The facts in the case were disputed by the student charged in the incident, who maintained he had not struck either of the students. In reviewing the "sharp dispute" about the facts of the case, the California court concluded that the expulsion should be set aside because the plaintiff did not have the opportunity to confront his accusers.

An expulsion of a student for missing a class more than 12 times was upheld by the Arkansas Supreme Court.[240] The school district's rules permitted expulsion for "excessive absenteeism" and also provided that a student could not receive credit in any course in which absences were recorded on more than twelve days. The plaintiff was absent totally from school only four days but failed to attend his physical science class fourteen times. The court concluded that the expulsion rule was within the power of the board to establish and refused to interfere with the decision, even though the rule did not define "excessive absenteeism." In a sharp dissent illuminating some of the issues in the case that the majority opinion avoided, one justice argued that the school district had the obligation to proceed under the state's truancy law, which

237. Boynton v. Casey, 543 F. Supp. 995 (D. Me. 1982).
238. 384 U.S. 436 (1966).
239. John A. v. San Bernardino City Unified School, 187 Cal. Rptr. 472 (Cal. 1982).
240. Williams v. Board of Educ. for Mariana, 626 S.W. 2d 361 (Ark. 1982).

requires an investigation into the causes of the absenteeism. The dissent concluded: "Even though appellant probably received procedural due process, he certainly did not receive substantive due process."[241]

Three cases raised questions about the adequacy of procedures used when students were first suspended and then subsequently expelled for the same misbehavior. As a rule, courts required the correct procedures be followed for both steps. In a Michigan case, a suspension of students for breaking into the school and burning attendance records started as a suspension but took on the character of an expulsion.[242] *Goss* procedures were followed in the initial suspension, but the series of administrative steps thereafter undertaken was extremely convoluted. The students' parents claimed that the students had been expelled while the school maintained it was seeking the placement of the students in another school. After wading through these conflicting claims, the district court finally concluded that the extended suspension had taken on the character of an expulsion and the failure to hold a formal hearing on the charge violated the students' due process rights. Following the Supreme Court's decision in *Carey v. Piphus*,[243] the court concluded that the students' rights had been violated but they also clearly were guilty of the offense at issue and therefore were entitled to one dollar in compensatory damages.

A Kentucky appeals court sustained the policy of a school district which automatically suspended students found consuming alcohol at school, but let stand a lower court decision that automatic expulsion for alcohol consumption was arbitrary.[244] The students in question had been found drinking on a school-sponsored band trip. The appeals court concluded that the lower court had been correct in its interpretation of the state suspension and expulsion statute which holds that suspension was mandatory for a first offense of this sort. Because mandatory expulsion is not mentioned in the statute, the appeals court concluded that the lower court did not exceed its authority in holding that the expulsions were unreasonable.

A Pennsylvania student who was suspended and then expelled for assaulting another student while under the influence of alcohol brought suit challenging the validity of the expulsion.[245] The student based his case on the grounds that he had been suspended for thirteen days before the expulsion hearing was held, in violation of the Pennsylvania code requiring a maximum of ten days before a hearing. The

241. *Id.* at 364.
242. Darby v. School, 544 F. Supp. 426 (W.D. Mich. 1982).
243. 435 U.S. 247 (1978).
244. Clark Cty. Bd. of Educ. v. Jones, 625 S.W.2d 586 (Ky. Ct. App. 1981).
245. Porter v. Board of School Dirs., 445 A.2d 1386 (Pa. Commw. Ct. 1982).

appeals court concluded that the period of time was excessive, but that the error was not of sufficient magnitude to require reversing an otherwise proper expulsion.

Another case also raised questions about a procedural error. A Wisconsin appeals court upheld an expulsion which had been reversed by the state superintendent of public instruction, even though some of the testimony presented at the hearing was hearsay.[246] The court noted that a school board could not be expected to know all the "niceties" of hearsay evidence and that the error in admitting the testimony was de minimis.

A Mississippi high school student who carried a switchblade knife to school was expelled for the remainder of the school year and sought an injunction to prevent the penalty. The injunction request was denied by a district court and the student's parents appealed to the Fifth Circuit Court of Appeals.[247] The student had admitted taking the knife to school and had received a hearing before the school board. On appeal, the plaintiffs contended that the school board's hearing was flawed because there was inadequate notice and no opportunity to confront witnesses. Instead, taped testimony from some witnesses was played for the school board. In considering this flaw, however, the court focused on the fact that the plaintiff had never denied the knife charge. Both the plaintiff and his mother had participated in the expulsion hearing and the court held that the flawed procedures were not fundamentally unfair or legally prejudicial. The student responded to this adverse decision by filing a request for a rehearing by the Fifth Circuit en banc.[248] While recommending that the school board change its practice regarding the use of taped testimony, the appeals court refused to grant the request, noting that the evidence against the student was "so overwhelming" that a school board rehearing would not change the result.

An eighth grade student who struck her teacher was suspended for the remainder of the school year and filed suit claiming the penalty was racially motivated.[249] Other procedural irregularities in the suspension hearing were also alleged, but these were dismissed by the court because the student had been represented by counsel at the suspension hearing and because no specific procedural flaw was cited. The court concluded that the racial discrimination charge also was unsupported by any testimony and refused to find that the plaintiff's mother, who was not rehired as a teacher aide by the school system, had been discriminated against for challenging the suspension.

246. Racine Unified School Dist. v. Thompson, 321 N.W.2d 334 (Wis. Ct. App. 1982).
247. McClain v. LaFayette Cty. Bd. of Educ., 673 F.2d 106 (5th Cir. 1982).
248. McClain v. LaFayette Cty. Bd. of Educ., 687 F.2d 121 (5th Cir. 1982).
249. Diggles v. Corsicana Indep. School Dist., 529 F. Supp. 169 (N.D. Tex. 1981).

A Nebraska student challenged his three-day suspension for fighting in a case heard by that state's highest court.[250] The student's claim was based on the suspension notice he had received indicating that he was being suspended for one incident, but the hearing he and his parents attended considered three previous altercations as well. Concluding that the case was "utterly frivolous," the Nebraska Supreme Court found that the suspension process had afforded the student adequate due process.

While the cases discussed in this section focus on procedural matters, one 1982 case raised substantive due process issues.[251] A high school senior was involved in a football game drinking incident and had been offered the choice of an in-school or out-of-school suspension. She chose the in-school penalty, but missed several class examinations. A lower court ruled that this denied the student her rights to substantive due process. Both parties appealed, the school district seeking reversal of the decision, and the parents seeking dismissal of the district's appeal on the grounds of mootness, as well as claiming attorney fees. The appeals court sustained the mootness claim, noting that the student had been graded in all the courses in question and had entered college. As to the attorney fees, the court concluded that fees awarded under 42 U.S.C. section 1988 could be made only if the issues in the case presented a violation of specific constitutional guarantees. The court denied the fees, noting the issues raised did not represent a sufficiently grave constitutional violation. Citing *Wood*, the court held that section 1988 was not intended to justify fees in cases involving simple administrative errors. In another case, a Georgia student also sought damages for a wrongful suspension.[252] A state appeals court held that the suspension might have been "hurried and erroneous," but was not willful or malicious, and it refused to award damages.

In a discipline case of a different sort, a California school district charged a student with a misdemeanor for threatening to hit a teacher.[253] The California education code prohibits a "parent, guardian or other person" from insulting or abusing a teacher. The district argued that a student could be treated as an "other person" under this provision. The appeals court disagreed, concluding that the code section was clearly intended for nonstudents who enter the school grounds to harass teachers.

250. Walker v. Bradley, 320 N.W.2d 900 (Neb. 1982).
251. Myre v. Board of Educ. of Seneca Twp., 439 N.E.2d 74 (Ill. App. Ct. 1982).
252. Dillard v. Fussell, 287 S.E.2d 98 (Ga. Ct. App. 1981).
253. *In re* G.R.B., 182 Cal. Rptr. 53 (Cal. Ct. App. 1982).

4.7b Corporal Punishment

Corporal punishment cases arise in states which have statutes or state code provisions permitting the practice. Claims that the punishment was excessive sometimes are made, though their number has declined in recent years. In the single case recorded in 1982,[254] West Virginia parents sought a writ of mandamus seeking to have that state's code on corporal punishment declared unconstitutional because it violated the cruel and unusual punishment provision of the state constitution.[255] The parents also argued that the state board of education had an obligation to promulgate rules regarding the use of corporal punishment. The case began when an eleven-year-old elementary student required hospital treatment following a paddling administered by his principal.

After accepting the writ of mandamus because of the magnitude of the issues involved, the West Virginia high court turned to the central issue. The school district argued that the doctrine of in loco parentis gave them the authority for the paddling, while attorneys for the parents argued that there must be limits on the discretion exercised by school personnel. The court sustained the parents' position, noting that *Goss* and other court cases had eroded the doctrine. In addition, the court cited the West Virginia child abuse statute as evidence that in loco parentis was no longer an unlimited license to treat students without principled limits. The court then accepted the cruel and unusual punishment argument "by analogy," while not reaching the constitutional claim, and banned the use of paddles and related devices. The court explicitly approved the continued use of corporal punishment "by hand" and took pains to explain that the forceful separation of unruly students was still permitted.

The West Virginia court went on to say that minimal due process rights must be afforded to students about to be punished. Borrowing from *Goss*, the court required that the student be given an opportunity to explain the event, and then that the punishment be carried out in the presence of an outside neutral observer. The state board of education was ordered to promulgate rules consistent with the decision. The West Virginia decision goes further than the most recent United States Supreme Court paddling case, wherein justices refused to see corporal punishment as cruel and unusual punishment or to require a hearing before its administration.[256]

254. Smith v. West Virginia State Bd. of Educ., 295 S.E.2d 680 (W. Va. 1982).
255. W. VA. CODE § 18-2-5.
256. Ingraham v. Wright, 430 U.S. 651 (1977).

4.8 TESTING AND PLACEMENT

The increased use of competency tests as a graduation requirement has given rise to lawsuits filed on behalf of minority group and handicapped students. In an important 1981 case challenging the Florida state competency test, the Fifth Circuit Court of Appeals ruled that the burden was on a school system to prove that their graduation test had "curricular validity" or tested items which actually were taught in the system.[257] A 1980 Georgia case, filed prior to the Fifth Circuit decision, approved the use of the California Achievement Test by the Tatnall county board of education as a graduation requirement.[258] A Georgia federal district court subsequently voided the use of the test, basing its decision on the Florida case.[259]

The Tatnall county board returned to district court in 1982 to show that the material on the California Achievement Test had actually been taught.[260] The district argued that the test was necessary to motivate an "apathetic school population" and to indicate which students were in need of remedial instruction. To prove that the test was valid, the district introduced evidence that the test questions reflected the district's curriculum, presenting testimony by both an outside expert and district employees. The plaintiffs countered with an expert who reached the opposite conclusion. In weighing its decision, the court was clearly unhappy with its role in deciding whether or not the test was fair, claiming that this was the first instance in which a court had to make a substantive academic decision. The court then decided that some deference had to be given to the authority of school personnel and concluded that the school district had made a "sufficient showing" that the test was fair.

The failure of handicapped students to pass minimal competency tests has been considered by courts in recent years. A New York court, for example, ruled in 1981 that two years' notice of a new graduation requirement was inadequate for handicapped students.[261] In a 1982 case, an Illinois district court considered a similar issue but reached the opposite conclusion.[262] The Peoria school district had established a policy requiring all students to pass examinations in reading, language arts and mathematics before they could receive a high school diploma.

257. Debra P. v. Turlington, 644 F.2d 397 (5th Cir. 1981).
258. Wells v. Banks, 266 S.E.2d 270 (Ga. Ct. App. 1980).
259. Anderson v. Banks, 520 F. Supp. 472 (S.D. Ga. 1981).
260. Anderson v. Banks, 540 F. Supp. 761 (S.D. Ga. 1982).
261. Board of Educ. of Northport-East Northport Union Free School Dist. v. Ambach, 436 N.Y.S.2d 564 (N.Y. Sup. Ct. 1981).
262. Brookhart v. Illinois State Bd. of Educ., 534 F. Supp. 725 (S.D. Ill. 1982).

Plaintiffs in the case had received one year's advance notice but had been unable to pass the tests, thereby receiving certificates of program completion rather than diplomas. The Illinois superintendent of public instruction then issued an order requiring that the handicapped students be awarded diplomas, concluding that federal law required that the tests be modified to minimize the effects of the students' handicapping conditions and that insufficient notice of the new requirement had been given. The school district went to federal court to have the superintendent's order overturned.

In a decision that made few references to cases in other jurisdictions, the district court reversed the superintendent's decision. A modified test, the court concluded, "would be a perversion of the program to lend meaning to the diploma as a record of educational achievement."[263] While a blind student might be offered the test in braille, the court rejected any alterations of test content. On the notice question, the court concluded that one year's notice was adequate, asserting that the only reason a student could not pass the test after that time was the failure of the student's instructional plan to include the curriculum on which the test was based. This argument brought the court back to its first conclusion, that no modification of the test itself was required for handicapped students. Concluding that cases in other jurisdictions were in no way controlling, the court reversed the superintendent's order. It is likely that this decision will be appealed.

Pennsylvania students who were not selected for their school's gifted and talented program filed suit challenging the state board of education regulations used by their local school district to identify program participants.[264] At the heart of their case, they alleged that they were receiving an inferior education because they had not been selected, in violation of their right to equal educational opportunity. They sought $60,000 in damages and admission to the program. In response, the state argued that the plaintiffs failed to state a cause of action, had not demonstrated that they had been denied the right to be evaluated for admission, and did not exhaust their administrative remedies. In reviewing the issues presented, the court concluded that the plaintiffs had a constitutional right to receive an education but not the right to dictate what form that education must take. Because the plaintiffs did not claim that the children were exceptional, or had been misclassified, the court concluded that they did not have standing to bring the suit. The court also decided that the plaintiffs had not exhausted the administrative remedies available to them under the Pennsylvania code they were challenging. Accordingly, the court dismissed the case.

263. *Id.* at 728.
264. Lisa H. v. State Bd. of Educ., 447 A.2d 669 (Pa. Commw. Ct. 1982).

4.9 DESEGREGATION

4.9a Systemwide Remedies

Two cases involving state-adopted referenda to prohibit mandatory busing for school desegregation were decided by the Supreme Court in 1982. A desegregation plan had been enacted in Seattle which involved the extensive use of forced busing. Initiative 350 was then passed by State of Washington voters in 1978 prohibiting a school board from requiring a student to attend a school farther than the one next closest to home. This, in effect, ended the use of busing as a desegregation tool in Washington. A federal district court, however, found Initiative 350 to be unconstitutional,[265] and this ruling was upheld by a federal court of appeals in 1980.[266] The case was then appealed to the Supreme Court.

Justice Blackmun, writing for the 5-4 majority, found that while the initiative prohibited busing for desegregation purposes, busing for other educational purposes was unaffected. He concluded, therefore, that the initiative violated the fourteenth amendment.[267] He added that the initiative also restructured the Washington educational process by placing the authority over some busing at the state level while leaving all other school powers in the hands of local boards. Blackmun said this placed an undue burden on minorities, quoting *Hunter v. Erickson*, "the core of the Fourteenth Amendment is the prevention of meaningful and unjustified official distinctions based on race."[268]

In *Crawford v. Board*,[269] the Supreme Court by an 8-1 vote affirmed a 1982 California Appeals Court ruling[270] which upheld a statewide referendum ending mandatory busing to achieve school desegregation in California. The referendum differed from Washington's in that it did not prohibit racial busing entirely. Rather, it limited state courts to ordering mandatory busing only in cases where a federal court would do so to remedy a violation of the fourteenth amendment. The Supreme Court majority agreed that California was merely receding from its previous, more stringent standard. Writing for the majority, Justice Powell noted, "It would be paradoxical to conclude that by adopting the Equal Protection Clause of the Fourteenth Amendment, the voters

265. Seattle School Dist. No. 1 of King Cty., Washington v. Washington, 473 F. Supp. 996 (W.D. Wash. 1979).
266. Seattle School Dist. No. 1 v. Washington, 473 F. Supp. 996; 633 F.2d 1338 (9th Cir. 1980).
267. Washington v. Seattle School Dist. No. 1, 102 S. Ct. 3187 (1982).
268. 393 U.S. 391 (1969).
269. Crawford v. Board of Educ. of City of Los Angeles, 102 S. Ct. 3211 (1982).
270. Crawford v. Board of Educ. of City of Los Angeles, 170 Cal. Rptr. 495 (Cal. Ct. App. 1981).

of the state had thereby violated it."[271] The Court rejected the argument that the referendum employed an invidious racial classification and was enacted with discriminatory intent, concluding, "The mere repeal of race related legislation is not unconstitutional."[272] A concurring opinion by Justice Blackmun distinguished *Washington v. Seattle* from *Crawford* by noting that the former case unconstitutionally reallocated educational authority to the state level making it harder for minorities to pursue racial equality.[273]

Desegregation plans for schools in other parts of the country continued to be reviewed by lower courts. In Little Rock, Arkansas, a district court granted the board of education permission to revise its desegregation plan.[274] The board wanted to close a center attended by all seventh grade students in the district because of declining enrollments and decreased funding. Because this was the only junior high school in a black neighborhood, the closing was opposed on the basis that it would place a disproportionate burden on black children because more blacks than whites would require busing. The district court's ruling was appealed to the Eighth Circuit Court of Appeals.[275] The court agreed that "[t]he burden of desegregation should be shared as equally as possible between blacks and whites,"[276] and used a set of factors developed by the Tenth Circuit Court to evaluate the case.[277] Using these, they found that enrollment and pending fiscal problems were valid nonracial reasons for closing the school. They also found that the school's location made it the best choice for closing. Finally, they held that the burden on black children would be essentially the same as under the original court-approved desegregation plan. Thus the school closing was approved.

In a complex case increasingly involving cross-district implications, school desegregation in St. Louis continued to be argued before the Eighth Circuit Court of Appeals.[278] In 1980, the district court responded to a remand order from the Eighth Circuit by developing a systemwide desegregation plan for St. Louis schools.[279] The plan was to include suburban schools and the state was told to pay one-half of the cost because it was held to be equally liable in causing the segregated schools. The Eighth Circuit heard appeals of the desegregation plan by

271. Crawford, *supra*, note 269 at 3217.
272. *Id.* at 3219.
273. *Id.* at 3222.
274. Davis v. Board of Educ. of North Little Rock, 520 F. Supp. 106 (E.D. Ark. 1981).
275. Davis v. Board of Educ. of North Little Rock, 674 F.2d 684 (8th Cir. 1982).
276. *Id.* at 687.
277. *Id.*
278. Liddell v. Board of Educ., St. Louis, 677 F.2d 626 (8th Cir. 1982).
279. Liddell v. Board of Educ., St. Louis, 491 F. Supp. 351 (E.D. Mo. 1980).

four parties, who challenged either its design or financing.[280] These appeals were rejected and the district court's plan was upheld. Litigation shuffleboard continued as eighteen more appeals then were heard by the Eighth Circuit.[281] The court grouped the appeals into several categories and decided which would be heard. The court admonished the parties to "avoid filing premature and piecemeal interlocutory appeals"[282] and said that it would hear the appeals over which it held jurisdiction in January of 1982.

On January 11, 1982, appeals of the desegregation orders of district Judge William Hungate were again heard.[283] The Eighth Circuit Court of Appeals continued to hold that the state was obligated to pay one-half of the desegregation expenses as well as certain costs of a voluntary interdistrict plan because of its role in creating the segregation. The planned merger of city and county vocational programs was also upheld, and the court refused to hold that Judge Hungate should excuse himself from further interdistrict hearings saying that although they lacked jurisdiction on the issue there was no legal basis for refusal. The court also refused to stop seventeen suburban school districts from being included as defendants. The case again was remanded to the district court for further proceedings.

Attempts to desegregate the Youngstown, Ohio, school system also continued. Plaintiffs appealed a district court ruling[284] which found that school officials had assigned a disproportionate number of black teachers to predominantly black schools, but were not guilty of operating a segregated school system. The Sixth Circuit Court of Appeals said "that it was not their function to determine whether they would have decided that an intentionally segregated school system had been created or maintained. Rather it was to review the district court's opinion, the record, briefs and oral arguments, and decide whether they left the court with a definite and firm conviction that a mistake had been committed."[285] There was a voluminous record with evidence supportive of either side but the appeals court was not convinced a mistake had been made, and they affirmed the findings of the lower court. The appeals court also concluded that the state was not liable for failing to investigate the condition of the school district. Because no violations existed, except for the teacher assignments, the state could not be liable for failure to correct or prevent them.

280. Liddell v. Board of Educ., St. Louis, 667 F.2d 643 (8th Cir. 1981).
281. Liddell v. Board of Educ., St. Louis, 693 F.2d 721 (8th Cir. 1981).
282. *Id.* at 727.
283. Liddell, *supra*, note 278.
284. Alexander v. Youngstown Bd. of Educ., 454 F. Supp. 985 (D. Ohio 1978).
285. Alexander v. Youngstown Bd. of Educ., 675 F.2d 787 (6th Cir. 1982).

In New York, a district court ruled that the Buffalo board of education had carried the burden of demonstrating the need for additional funds in order to ensure compliance with the court's desegregation orders.[286] This was the second year in a row that the board had to go to court to force the city to provide additional funds. Under New York law, the school board is financially dependent on the city. Plaintiffs in the case asked that the desegregation plan be expanded to include six more elementary schools. The court ruled against this, saying that "it would be financially burdensome, disruptive, and would not significantly benefit the desegregative effort."[287]

The continuing saga of desegregation in Boston, Massachusetts, was before the First Circuit Court of Appeals.[288] The City of Boston, the Boston school committee and the Boston home and school association appealed court ordered desegregation. The court order had rejected "linkage" and "beacon" school concepts proposed by the appellants to ameliorate the effect of school closings. The order also closed two elementary schools in addition to the ten proposed to satisfy the court, ordered further student assignment modifications, and refused to let a high school be converted into a middle school.

The appeals court noted that only the student assignment, "linkage" and "beacon" school issues were undecided. The court ruled that the district court's insistence on a student assignment plan more in line with the goals stated in its 1975 plan, instead of the school committee's less comprehensive plan, was not an abuse of discretion. The appeals court also agreed with the rejection of the "beacon" school proposal. They found the idea to have been a last-minute addition that was incomplete and required reworking. The appeals court ruled in a similar fashion on the "linkage" school proposal which had also been added at the last minute. The court also affirmed the rejection of a motion to terminate the district court's jurisdiction over student assignments. The court noted that progress had been made in desegregation and urged renewed efforts toward the achievement of a unitary school system and court disengagement.

The Boston teachers union appealed a court order shielding teachers at South Boston High School from layoffs, which conflicted with the system's seniority system.[289] The appeals court held that the district court had correctly concluded that layoffs of a great portion of faculty would undermine desegregation efforts, and the court could therefore enter an order shielding teachers.

286. Arthur v. Nyquist, 547 F. Supp. 488 (W.D.N.Y. 1982).
287. *Id.* at 484.
288. Morgan v. McDonough, 689 F.2d 265 (1st Cir. 1982).
289. Morgan v. O'Bryant, 687 F.2d 510 (1st Cir. 1982).

The court order which desegregated the Waco, Texas, school system in 1973 divided the district into attendance zones. Many students were reassigned to new schools. Some parents subsequently claimed that their children lived with someone else in order to allow them to attend a desired school, and the school board adopted a policy that allowed only pupils residing with a parent, guardian, or managing conservator to attend school tuition free. A trial court refused to invalidate the policy and the plaintiffs appealed.[290] The state appeals court held that the policy did not violate section 21.031 of the Texas Education Code which deals with the right to attend public free schools. The court found that there was ample evidence supporting the need for the policy to enforce federal court-ordered desegregation.

4.9b Cross-District Remedies

Courts have continued to order cross-district school desegregation plans where several units of government have been held responsible for school segregation. This has led to protracted litigation by parties both for and against desegregation plans in several cities.

The decade-old desegregation struggle in western Pennsylvania continued with several cases appearing in 1982. In the spring of 1981, an appeals court had ruled that no further delay in fashioning a desegregation remedy for the General Braddock Area School District would be permitted.[291] A multidistrict remedy involving the merging of five school districts into one was subsequently approved and implemented in the fall of 1981.[292] This plan, ordered by a district court, was appealed to the Third Circuit Court of Appeals on two grounds.[293] First, the original 1973 district court's finding of de jure segregation[294] was challenged. Second, the multidistrict remedy ordered and implemented was challenged. The appeals court found that, although the finding of de jure segregation occurred before *Keyes*,[295] the district court had satisfied the standard set forth in *Keyes* that proof of segregative intent or purpose is needed to establish a prima facie case of de jure segregation.[296] The court listed nine examples of direct evidence of segregative intent or purpose which had been cited by the district court in its decision. The appeals court also

290. Jackson v. Waco Indep. School Dist., 629 S.W.2d 201 (Tex. Ct. App. 1982).
291. Hoots v. Commonwealth of Pa., 639 F.2d 972 (3d Cir. 1981); *cert. denied*, 101 S. Ct. 3113 (1981).
292. Hoots v. Commonwealth of Pa., 545 F. Supp. 1 (W.D. Pa. 1981).
293. Hoots v. Commonwealth of Pa., 672 F.2d 1107 (3d Cir. 1982).
294. Hoots v. Commonwealth of Pa., 359 F. Supp. 807 (W.D. Pa. 1973).
295. Keyes v. School Dist. No. 1, 413 U.S. 189 (1972).
296. Hoots, *supra*, note 293.

approved the district court's additional use of circumstantial or objective evidence to find segregative intent. This approach was supported by Supreme Court decisions in *Dayton II*[297] and *Columbus*.[298] The appeals court then concluded that the finding of de jure segregation was fully supported by the record.

When considering if the multi-district remedy was proper, the appeals court used *Milliken*[299] as the controlling case. The Pennsylvania State Board of Education and county school boards were found guilty of an interdistrict violation when they created the intentionally segregated district.[300]

Part of the district court's desegregation plan[301] involved the use of an interim committee to govern the new school district. The composition of this committee was challenged in the Third Circuit Court of Appeals.[302] The court held that because the interim committee had been replaced by a board of school directors the issue was moot. They further held that the composition of the board and the timing of elections were acceptable.

When the five Pennsylvania school districts were merged into one, each remained financially independent until the end of the school year in June, 1981. At that time, two school districts attempted to rebate surplus monies back to the taxpayers of their districts in order to prevent the funds from becoming property of the new school district. The district court issued a preliminary injunction preventing this. A group of taxpayers from the two districts, named "Save Our Schools," attempted to intervene in the issue of whether the injunction should be made permanent. The district court denied their motion to intervene and this was upheld by the Third Circuit Court of Appeals.[303] The district court subsequently made the injunction permanent.[304]

The original desegregation plan for the G.B.A.S.D. was intended only for the 1981-82 school year. A plan to furnish complete desegregation of the five school districts, now known as the Woodland Hills School District, was ordered by the district court in May, 1982.[305] The court listed five criteria for an effective desegregation plan; it should be in effect and operating for the start of the 1982-83 school year, it should ensure that no racially identifiable schools remain, the burden

297. Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526 (1979).
298. Columbus Bd. of Educ. v. Penick, 443 U.S. 449 (1979).
299. Milliken v. Bradley, 418 U.S. 717 (1974).
300. Hoots, *supra*, note 294.
301. Hoots, *supra*, note 292.
302. Hoots, *supra*, note 293 at 1124.
303. *Id.* at 1133.
304. Hoots v. Commonwealth of Pa., 535 F. Supp. 1194 (W.D. Pa. 1982).
305. Hoots v. Commonwealth of Pa., 539 F. Supp. 335 (W.D. Pa. 1982).

of desegregation should be shared equally between blacks and whites, facilities within the traditionally black community should be maintained as operational where practical, and maintenance of the highest educational standards for all students in the district should be ensured.[306] The desegregation plans offered by the new school board, although revised several times, were found to be inadequate. A plan offered by the plaintiffs involving the clustering of schools into attendance zones was then adopted by the court with a few modifications. The court felt hopeful that after eleven years of litigation, this plan would finally desegregate the new Woodland school district and "provide all students of the district with the greatest possible range of educational opportunities."[307]

Who should bear the cost of the interdistrict desegregation plan in Indianapolis was at issue before the Seventh Circuit Court of Appeals.[308] The court of appeals first concluded that it was within the district court's remedial power to allocate the costs of a desegregation plan. Because the state of Indiana had been found solely liable for the interdistrict violations,[309] the district court was sustained in holding the state solely liable for the costs of remedying the violations. As the appeals court put it, "[t]he wrongdoer cannot evade the cost of remedying the wrongdoing."[310] This included the cost of extracurricular transportation and reimbursement for financial losses caused by transferred students. The state appealed this holding but the United States Supreme Court denied certiorari in December, 1982.

Litigation involving the desegregation of the Cincinnati school system, which began in 1963, appeared to be moving closer to a conclusion. In a long and detailed opinion, the district court addressed the issue of whether the Supreme Court's decisions in *Columbus*[311] and *Dayton II*[312] renderd some of the previous litigation in Cincinnati obsolete.[313] The court declared that although *Columbus* and *Dayton II* have not overruled or radically departed from earlier Supreme Court cases, they have established several supplemental issues not previously litigated in Cincinnati. Plaintiffs were therefore ruled not to be collaterally estopped from litigating if the school board's practices prior

306. *Id.* at 343.
307. *Id.* at 351.
308. United States v. Board of School Comm'rs, Indianapolis, 677 F.2d 1185 (7th Cir. 1982).
309. United States v. Board of School Comm'rs, Indianapolis, 456 F. Supp. 183 (S.D. Ind. 1978).
310. United States, *supra*, note 308 at 1188.
311. Columbus Bd. of Educ. v. Penick, 443 U.S. 449 (1979).
312. Dayton Bd. of Educ v. Brinkman, 443 U.S. 526 (1979).
313. Bronson v. Board of Educ., 535 F. Supp. 846 (S.D. Ohio 1982).

to *Brown*,[314] whether remote or intentional, had caused segregation which was not then eliminated after 1954. In 1975, when an appeals court last ruled on this case,[315] *Columbus* and *Dayton II* had not been decided so desegregation law had not evolved to a point where this was an issue. The Court also ruled, however, that collateral estoppel could be invoked to prevent relitigation of whether the school board's practices from 1954 to 1965 had in themselves caused segregation. The school board's practices during this time period were originally litigated in 1965.[316] The 1975 appeals court decision upholding this ruling was not changed by *Columbus* and *Dayton II*, said the court.

Plaintiffs representing minority students brought suit in district court to prevent the closing of a predominantly black elementary school in Cincinnati.[317] The plaintiffs' motion for a preliminary injunction was denied when they failed to demonstrate a likelihood of success on the merits of their claim, or that irreparable harm would occur without the injunction. The court said that the school closing appeared to be based on substantive policy factors and that it did not appear to have a disproportionate effect on black or Appalachian students. The court did not agree with the school board's motion to dismiss the suit entirely, however, because arguments regarding the decision might be made for which no adequate remedy of law would then exist. The court did dismiss the portion of the claim in which plaintiffs asserted that their due process rights had been violated through assignments to new schools. The court held that the plaintiffs had no right under Ohio law to attend a particular school and that there was no recognizable property interest in attending a particular school. The court also dismissed the charge that the school closing discriminated against Appalachians in violation of Title VI of the Civil Rights Act, which protects against discrimination on the basis of race, color, or national origin. The court held that national origin was not meant to include Appalachians.

4.9c Developments Under *Swann* and *Keyes*

Desegregation in Denver continued to be supervised by the federal district court, as it has since *Keyes* in 1972.[318] The district court last year approved a desegregation plan for the 1982-83 school year that reduced the number of children being bused by 2,600.[319] The modified

314. Brown v. Board of Educ. of Topeka, 347 U.S. 483 (1954).
315. Bronson v. Board of Educ., 525 F.2d 344 (6th Cir. 1975).
316. Deal v. Cincinnati Bd. of Educ., 244 F. Supp. 572 (S.D. Ohio 1965).
317. Bronson v. Board of Educ., 550 F. Supp. 941 (S.D. Ohio 1982).
318. Keyes v. School Dist. No. 1, 413 U.S. 189 (1972).
319. Keyes v. School Dist. No. 1, 540 F. Supp. 399 (D. Colo. 1982).

plan was the result of negotiations between the school board and attorneys for minority children. The plan was accepted only on a one-year trial basis, because the court had considerable reservations as to the commitment to desegregation of the school board. The board had wanted to end mandatory busing for desegregation entirely. Court evaluation and monitoring were to continue.

Plaintiffs in Akron, Ohio, were unsuccessful in overturning a 1980 ruling[320] that found the Akron school board to be innocent of segregative intent.[321] Three liability claims were argued against the school board in the appeal. First, it was claimed that the school board had used attendance zones with segregative intent, resulting in a dual-race system by 1965. The appeals court said that this issue had been decided in 1968 and could not be relitigated, quoting a Sixth Circuit case[322] as a guide on this issue.

The plaintiff-appellants also claimed that after 1965 the school board had failed to dismantle the dual system which was by then in place. The court rejected this, holding that proof of intent is constitutionally required for de facto segregation, and the board's innocence was no longer in question. The school board was also charged with being liable for the discriminatory housing practices of several other government agencies. The appeals court said that it would place too heavy a burden on the school board to remedy practices that they were not responsible for.

In 1981, a federal district court approved a desegregation plan prepared by the board of education in Nashville.[323] Plaintiffs in the case, who had also prepared a desegregation plan, appealed the decision.[324] Citing *Swann*,[325] the appeals court found fault with two areas of the district court ruling. The district court had ordered that there be a minimum presence of fifteen percent of either race in all middle schools and high schools. The appeals court said that it was not appropriate to allow schools to have up to eighty-five percent of one race in a school system with a sixty-eight percent white population. Noting that *Swann* recognized an individual has "no constitutional right to any particular degree of racial balance,"[326] the court also recognized

320. Bell v. Board of Educ., Akron Pub. Schools, 491 F. Supp. 916 (N.D. Ohio 1980).
321. Bell v. Board of Educ., Akron Pub. Schools, 683 F.2d 963 (6th Cir. 1982).
322. Bronson v. Board of Educ., 525 F.2d 344 (6th Cir. 1975).
323. Kelley v. Metropolitan Cty. Bd. of Educ. of Nashville and Davidson Cty., 511 F. Supp. 1363 (M.D. Tenn. 1981).
324. Kelley v. Metropolitan Cty. Bd. of Educ. of Nashville and Davidson Cty., 687 F.2d 814 (6th Cir. 1982).
325. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971).
326. Kelley v. Metropolitan Cty. Bd. of Educ. of Nashville and Davidson Cty., 687 F.2d 814, 818-819 (6th Cir. 1982).

that every effort must be made to eliminate one-race schools and thus a dual school system. The court suggested use of the formula used in *Columbus*:[327] no more than a fifteen percent deviation from the school system's racial proportions in any school.

The district court had also ordered that grades kindergarten through four be set up as neighborhood schools, citing the advantages of a neighborhood school system for elementary students. Using Chief Justice Burger's unanimous opinion in *Swann*, the appeals court said that "no matter whether neighborhod schools may be desirable on some grounds, their advantages cannot outweigh the constitutional requirement to desegregate the schools."[328] The appeals court also upheld the conversion of a high school into a middle school and the construction of a new high school because they were not "based on clearly erroneous findings or founded in a racially discriminatory purpose."[329] The case was then remanded to the district court for further proceedings.

4.9d Other Federal Cases

The Tenth Circuit Court of Appeals refused to allow two black students to bring independent actions in the desegregation litigation involving Topeka, Kansas.[330] In 1979, plaintiffs were successful in reopening the historic *Brown v. Board of Education* case.[331] The appeals court held that an independent action could not be brought while the original case was still pending because the plaintiffs could still file a motion to intervene.

4.9e Fifth Circuit Cases

Fifth Circuit courts continued to hear a number of ongoing desegregation disputes. In Dallas, a large number of minority parents opposed continued use of busing for children in grades four through eight. The Dallas Independent School District submitted a plan to the district court that would have allowed minority students to remain in their neighborhood schools, waiving their constitutional rights to be bused to a desegregated school.[332] This was known as the Minority Neighborhood Option Plan. The plan posed a dilemma for the court,

327. Columbus Bd. of Educ. v. Penick, 443 U.S. 449 (1979).
328. Kelley v. Metropolitan Cty. Bd. of Educ. of Nashville and Davidson Cty., 687 F.2d 814 (6th Cir. 1982).
329. *Id.* at 824.
330. Miller v. Board of Educ. of Topeka, 667 F.2d 946 (10th Cir. 1982).
331. Brown v. Board of Educ. of Topeka, 84 F.R.D. 383 (D. Kan. 1979).
332. Tasby v. Wright, 542 F. Supp. 134 (N.D. Tex. 1982).

which had to balance the constitutional mandate for school desegregation and minority disenchantment with busing which, the court said, "has considerable merit on both law and equity."[333] The district court held that the plan had to be looked at within the constraints of the appeals court remand of 1978,[334] directing the court to apply *Swann*[335] mandated transportation techniques. The court concluded it could not, therefore, authorize such a drastic change in busing as the plan would entail. The court also held that the plan collided "with the command of the law to achieve maximum desegregation,"[336] and that desegregation achievements already accomplished would be adversely affected.

The school board in East Baton Rouge Parish, Louisiana, was ordered to implement a district court desegregation plan for its schools in 1981.[337] The plan was ordered to be implemented in two stages: elementary schools in 1981, followed by secondary schools in 1982. The court granted the request of the school board to submit a plan of its own for desegregating the secondary schools. The board submitted a plan along with the proposals of various citizen groups in October, 1981. The district court said it could not accept the board's desegregation plan because it did not eliminate all one-race middle schools.[338] The citizen's proposals were rejected because they dealt only with specific schools and not the entire school system. The court did agree to the school superintendent's proposal modifying feeder schools at the senior high school level which reduced the need for busing.

In March, 1982, the school board submitted another plan to the district court for desegregation of the middle schools. The district court held that, although the plan did not more effectively desegregate the school system than the court's plan, it would achieve a satisfactory level of desegregation.[339] The court viewed the plan as a "historic" breakthrough noting, "for the first time the Board has adopted a proposal which comes near to actually desegregating a substantial portion of the school system."[340] The court reaffirmed its position that it had no commitment to any particular desegregation plan but merely was committed to the elimination of all vestiges of racial segregation in the school system. The court accepted the plan with a few modifications, hoping

333. *Id.* at 136.
334. Tasby v. Estes, 572 F.2d 1010 (5th Cir. 1978).
335. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971).
336. Tasby, *supra*, note 332 at 138.
337. Davis v. East Baton Rouge Parish School Bd., 514 F. Supp. 869 (M.D. La. 1982).
338. Davis v. East Baton Rouge Parish School Bd., 533 F. Supp. 1161 (M.D. La. 1982).
339. Davis v. East Baton Rouge Parish School Bd., 541 F. Supp. 1048 (M.D. La. 1982).
340. *Id.* at 1051.

that those implementing their own plan would be more likely to look for ways to make it work than for ways to make it not work. One modification dealt with the proposed use of Oriental students as "white" students in the calculation of racial composition of a middle school. The appeals court said they could not be utilized for this purpose.

The litigation involving desegregation in Jackson, Mississippi, which began in 1963 has come to an end, as a district court dismissed the suit from its docket.[341] The court cited the lengthy history of the desegregation effort and used six criteria set forth by the United States Supreme Court in *Green v. County School Board of New Kent County*[342] to determine if the school system was still dual-race or unitary. The Jackson School District was found to be fully integrated in all six—faculty, staff, transportation, extracurricular activity, facilities, and composition of student body—thus achieving unitary status. The court said that the school district had been unitary since 1971 and had complied with all desegregation directives and orders. The court then concluded that it had no further constitutional function to perform in the case.

Two Georgia cases were decided last year. Although a desegregation case involving Walton County was never certified as a class action suit, the Fifth Circuit ruled it had been treated as such originally by the district court.[343] The court held that additional members of the class could therefore be substituted as plaintiffs to prevent the action from becoming moot. The court affirmed a district court's order refusing to amend its original desegregation decree which made use of mandatory attendance zones. Using an earlier Fifth Circuit case for guidance,[344] the court also held that parents in Walton County should be allowed to intervene in the desegregation action.

In Baldwin County, a district court ruled that a decrease in the number of black teachers from forty percent to thirty-two percent did not establish the fact that the board of eduction had frustrated the goal of a unitary school system.[345] The appellants provided no evidence that the change had resulted from discriminatory board practices, and the court said that the board was not required to maintain the same black-white teacher ratios permanently. The court also refused to allow parents to intervene on behalf of the black teachers because they had failed to produce more than a minimal amount of evidence in the eight

341. Singleton v. Jackson Mun. Sep. School Dist., 541 F. Supp. 904 (S.D. Miss. 1981).
342. 391 U.S. 430 (1968).
343. Graves v. Walton Cty. Bd. of Educ., 686 F.2d 1135 (5th Cir. 1982).
344. Hines v. Rapides Parish School Bd., 479 F.2d 762 (5th Cir. 1973).
345. United States v. Baldwin Cty. Bd. of Educ., 544 F. Supp. 367 (M.D. Ga. 1982).

months they had been given to prepare. It was the court's opinion that the United States would continue to be the best representative of parents, teachers and students of the school system.

Desegregation of the public schools in the Parish of Pointe Coupee, Louisiana, was again before the district court.[346] After the Fifth Circuit remanded the case for further proceedings in 1974,[347] the school board failed to advance any plans for further school desegregation. In 1980, the United States filed for supplemental relief. After negotiations between the original plaintiffs, the federal government, and the school board, a consent decree for complete desegregation of the school system was filed in the fall of 1981. At the time of the hearing on the decree in 1982, the plaintiffs presented written objections to portions of the plan. The district court said that it was the "current law of the Fifth Circuit that a district court is required to approve a consent decree which the parties have agreed upon, unless it contains provisions which are unreasonable, illegal, unconstitutional or against public policy."[348] Accordingly the court said it had to approve the portions of the decree to which there was complete agreement. After looking at the objections of the plaintiffs, the testimony of the school superintendent, and the consent decree as a whole, the court concluded that it would not impair the constitutional rights of the plaintiffs and would achieve their interest in the desegregation of the school system. Looking favorably upon the school board's support of the plan and its willingness to comply with constitutional mandates, the court approved the consent decree in its entirety.

In a similar situation, the Fifth Circuit approved implementation of stipulations agreed to by the federal government and the Port Arthur Independent School District.[349] In 1980, the federal government had filed a motion in district court requesting that the district be ordered to develop plans fully to desegregate its schools in compliance with the requirement of earlier court-ordered desegregation. The school district said there was no need for a court order and requested that it be allowed to implement desegregation modifications proposed by a multiracial citizens' advisory committee. The district court entered an order ruling that the school district had made a good faith effort to comply with desegregation orders and approved the new modifications. The government appealed.[350] The parties reached a negotiated agreement

346. Boyd v. Pointe Coupee Parish School Bd., 534 F. Supp. 555 (M.D. La. 1982).
347. Boyd v. Pointe Coupee Parish School Bd., 505 F.2d 632 (5th Cir. 1974).
348. Boyd, *supra*, note 346 at 556-57.
349. United States v. Texas Educ. Agency, 679 F.2d 1104 (5th Cir. 1982).
350. *Id.*

and submitted a brief to the Fifth Circuit outlining the desegregation plan. The Fifth Circuit approved and remanded the case to the district court for implementation as requested by the parties.

4.9f State Courts

The Supreme Court of California upheld a desegregation plan developed by the Oxnard, California, board for its high schools.[351] The court held that it was proper to use five criteria listed in the board of education's regulations to determine which schools were segregated. Plaintiffs had argued that the board had incorrently determined which schools were segregated because it had not used specific numerical criteria. The court also held that the use of a multiracial advisory committee composed of parents, teachers, principals, administrators, and students had satisfied the requirement to assess community attitudes as to which schools were segregated. The advisory committee and public hearings were also sufficient to satisfy the board of education regulation requiring community involvement, according to the court. The court held that adequate notice of the public hearings had been given through the local newspapers and a notice sent to parents of all students currently attending high schools in the system.

Two cases involving desegregation came before Pennsylvania courts. The Pennsylvania Human Relations Committee asked a court to force Philadelphia to submit a new desegregation plan containing mandatory elements.[352] In response, the court ruled that a substantial number of racially identifiable schools had been unaffected by the school system's voluntary desegregation program. The court noted, however, that the desegregation program had educational merit, that it had resulted in the desegregation of some schools, and that significant additional gains were likely if the district remained committed to the plan. The court held that comprehensive desegregation could be best effected through modification of the school district's voluntary plan.

The Pittsburgh Board of Public Education petitioned an appeals court for an evidentiary hearing to establish its compliance with court-ordered desegregation.[353] The Pennsylvania Human Relations Committee then filed to have the board held in contempt for noncompliance with the orders. The court held that the board should not

351. McKinny v. Oxnard Union High School Dist., 181 Cal. Rptr. 549 (Cal. 1982).
352. Pennsylvania Human Rels. Comm'n v. School Dist. of Philadelphia, 443 A.2d 1343 (Pa. Commw. Ct. 1982).
353. Pennsylvania Human Rels. Comm'n v. Board of Pub. Educ. of School Dist. of Pittsburgh, 444 A.2d 792 (Pa. Commw. Ct. 1982).

be held in contempt because it had made a good-faith effort by implementing a substantial compulsory desegregation plan, which resulted in full compliance in the middle schools and progress at other levels. The court ruled that this plan should be maintained and further modified to achieve full compliance with court-ordered desegregation.